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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-445

STATE OF NEW JERSEY,

Respondent,

vs.

RICHARD T. HAMILTON,

Petitioner.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

PETITION FOR WRIT OF CERTIORARI AND APPENDIX IN SUPPORT THEREOF

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. _____

STATE OF NEW JERSEY,

Respondent,

vs.

RICHARD T. HAMILTON,

Petitioner.

Petition for Writ of Certiorari and Appendix in Support Thereof

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

PETITION FOR CERTIORARI

The Petitioner, RICHARD T. HAMILTON, prays that a writ of *certiorari* issue to review the judgment of the Appellate Division, Superior Court of the State of New Jersey and the denial of certification by the New Jersey Supreme Court:

OPINIONS BELOW

The decision of the Bergen County Court, Criminal Division is unreported and reproduced in the Appendix. This decision constitutes the last few pages of the transcript of the Motion to Suppress (2T85-1 to 2T98-5).

The opinion of the Appellate Division, Superior Court of New Jersey, which affirmed the lower court's decision, is unreported at this writing, and is reproduced in the Appendix (Pa118).*

The Supreme Court of New Jersey denied a petition for certification without filing an opinion (Pa120).

* The reference "P" applies to Petitioner's Appendix.

JURISDICTION

The jurisdiction of this Court is involved under 28 U.S.C. (1257[3]).

This petition for *Certiorari* was filed less than ninety days from the denial of certification by the New Jersey Supreme Court. See Supreme Court Rule 22.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment 4:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment 14; Section 1:

> All Persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United State; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

QUESTION PRESENTED

Whether the discovery of heroin in a paper bag under the dashboard of petitioner's car was the product of an illegal search and seizure in violation of the Fourth Amendment, applicable to state action by the Fourteenth Amendment.

STATEMENT OF THE CASE

On October 20, 1971 the Bergen County Grand Jury returned Indictment No. S-1469-71 (Pa1). This indictment charged Richard Hamilton, with: (count 1) Possession of heroin contrary to the provisions of *N.J.S.A.* 24:21-20(a)(1); (count 2) Possession of a Controlled Dangerous Substance with intent to distribute contrary to the provisions of *N.J.S.A.* 24:21-19(a)(1); (count 3) Carrying a concealed weapon contrary to the provisions of *N.J.S.A.* 2A:151-4.

A pre-trial motion to suppress certain evidence was denied by the Honorable Fred C. Galda, J.B.C. Immediately following this hearing, a jury trial was commenced, the Honorable Fred C. Galda, J.B.C. presiding.

Mr. Hamilton was convicted of possession of heroin, acquitted of carrying a concealed weapon and no verdict was reached by the jury with regard to the charge of possession of heroin with intent to distribute (Pa115).

On June 28, 1972, Mr. Hamilton was sentenced to serve three to five years in the New Jersey State Prison (Pa115).

The denial of the motion to suppress was appealed to the Superior Court, Appellate Division (Pa116). The denial was affirmed by the Appellate Division (Pa118).

On May 29, 1973, Mr. Hamilton's petition for certification and appeal to the N.J. Supreme Court was denied (Pa120).

The Petitioner now seeks to have this Court review the denial of the motion to suppress.

STATEMENT OF FACTS

In the Petition for Letter Certiorari in the Case of State v. Hamilton

Patrolman Albert Adcock of the Bergen County Police Force was on Patrol duty on August 30, 1971, at approximately 4 A.M., when a vehicle caught his attention because it was dirty and had a brand new license plate (T3, 8-9)*

The police officer followed the automobile into a gas station, where the driver conducted some business (T3, 3-16). Thereafter, the individual drove past the police officer at an alleged high rate of speed (T3, 13-17). The police officer testified that he had to travel at the rate of 75 m.p.h. to 85 m.p.h. in order to catch the individual (T3, 18-20).

When the police officer turned on his dome lights, the driver, Richard T. Hamilton, stopped his automobile (T4-5). When asked for his license and registration, Mr. Hamilton produced two notarized slips of paper with "Atlantic City" written across the top. One slip of paper read: "Reported Registration missing" and the other slip of paper read: "Reported License missing" (T4, 13-17). The registration number on the papers checked out with the license plate numbers on Mr. Hamilton's car (T27, 7-8). Mr. Hamilton explained on direct examination that Pennsylvania has a system for dealing with lost registration cards and licenses whereby an individual can report the loss to a local office. The individual is then given a notarized slip of paper showing that the loss was reported and stating that there shall be no penalty for a period of 30 days, for failure to have the lost items. This was the pro-

* T refers to the transcript of the hearings on January 24, 1972.

cedure followed by Mr. Hamilton when his car was burglarized in Atlantic City. This burglarly was reported to the Atlantic City Police Department (2T22-16 to 2T23-5).* Unfortunately, these notarized slips of paper were stolen two weeks after Mr. Hamilton's arrest, along with his tires, motor, etc. and could not be produced at trial.

Mr. Hamilton was asked for some other identification but he explained that his wallet had been stolen along with his license and registration (T5, 1-3).

The police officer asked Mr. Hamilton to open the glove compartment. Mr. Hamilton opened the glove compartment with his key and the police officer flashed his flashlight in that direction. The glove compartment contained an expired Pennsylvania permit and a registration card for an automobile similar to the one Mr. Hamilton was driving, but with a different license plate number (T5, 13-16). Mr. Hamilton explained on direct examination that this registration card was for the car he was driving but it listed the old license plate numbers for his car. New plates had been issued to him in March of 1971, which were good for 5 years (2T25, 6-18).

The police officer, after observing that Mr. Hamilton's keys were duplicates, or keys other than General Motors' original blanks, asked Mr. Hamilton if his keys fit the lock to the trunk (T8, 22-25); (2T13, 8-13). Mr. Hamilton complied with the police officer's request to open the trunk, thus establishing that his keys fit the lock. Mr. Hamilton testified that he opened the trunk approximately four or five inches and then closed it (2T13, 14-19).

The police office investigated further by employing a tactic which he characterized as a "trick" (T11-12 to T12-3). He asked Mr. Hamilton what items were contained in the trunk, Mr. Hamilton replied that a jack, spare tire, six

* 2T refers to the transcript of the hearing on March 6th and 7th.

small boxes, and other miscellaneous items were contained in the trunk (T9, 2-5). The police office first testified that he did not know if he or the defendant then opened the trunk (T9, 1-5). However, Officer Adcock later testified that he had opened the trunk (T9, 6-7). Mr. Hamilton testified that the police officer opened the trunk (2T14, 6-8).

When the trunk was opened the police officer observed the six boxes and the other items which Mr. Hamilton has said were in the trunk. The next sequence of events is not clear. Officer Adcock testified that Mr. Hamilton told him that the boxes contained small bags used for packing garlic seeds and things of that nature. The officer further testified on direct examination that one of the boxes was opened and he observed that the box contained glassine envelopes (T9, 6-21). However, on cross-examination, Officer Adcock testified that he guessed that he had opened one of the boxes (T25, 3-7).

Mr. Hamilton recalled the events occurring subsequent to the opening of the trunk, somewhat differently. He testified that the police officer ordered him to open one of the boxes. According to Mr. Hamilton, the police officer stated that he would take full responsibility for the opening of the box. But Mr. Hamilton refused to comply stating that the boxes belonged to his boss. Thereafter the police officer ripped open one of the boxes (2T15, 1-15).

After Officer Adcock discovered the glassine envelopes, he radioed for assistance (T9, 20-24). Mr. Hamilton testified that at this point he was searched and forced to roll up his sleeves (2T15, 13-19). Officer Adcock admitted that he may have patted Mr. Hamilton down and rolled up Mr. Hamilton's sleeves at this time (T26, 6-14). The officer later testified that he probably looked at Mr. Hamilton's arms "somewhere along the line" (T34, 23-25).

When assistance arrived, Officer Adcock testified that he decided to check the serial number of the car. The serial number is located on the lower portion of the door jamb, so Officer Adcock purportedly squatted down and directed his flashlight in that direction (T10, 1-18). He testified that while he was looking at the serial number he happened to look up and see a paper bag under the center of the dashboard. Officer Adcock admitted that by this time he was looking for narcotics (T34, 5-7). Officer Adcock testified that the bag was ripped and that this rip enabled him to see inside the bag. Officer Adcock testified that through the rip he observed a glassine envelope containing a white substance (T10, 18-22). After removing the paper bag from the automobile, Officer Adcock placed Mr. Hamilton under arrest (T10-23 to T11-1).

On cross-examination, Officer Adcock was asked whether he had determined, upon finding the glassine envelopes in the trunk, that the car would be thoroughly searched. He replied that "It wasn't necessary" (T34, 8-15).

Mr. Hamilton testified that the dashboard on his automobile is at the same level as the serial number's location on the door. He further testified that a person looking directly at the serial number would not be in a position where he could possibly observe anything underneath the dashboard of his automobile (2T17-5 to 2T18-1). Most importantly, Mr. Hamilton testified that Officer Adcock did not even go through the motion of examining the serial number. Rather, when the other police officers arrived on the scene, they joined Officer Adcock in summarily searching the car (2T16, 4-24) Mr. Hamilton was told to "shut-up" and "don't move" (2T15, 11-19).

Among the additional facts bearing on the issues here involved, is that Mr. Hamilton was neither issued a sum-

mons nor convicted of speeding in connection with the events in question (2T21, 17-21).

Also, subsequent events clearly established that Mr. Hamilton had been driving his own car on the night in question and not a stolen motor vehicle (2T16, 14-16).

A motion to suppress the seized heroin was denied (T98, 4-5). Mr. Hamilton was subsequently tried and convicted of possession of heroin (Pa115).

REASONS FOR GRANTING THE WRIT

POINT I

The discovery of heroin was the fruit of an illegal detention and must be suppressed.

An appropriate introduction to this point is the following observation made by this court in *Terry v. Ohio*, 392 U.S. 1 (1968):

> "There is some suggestion in the use of such terms as "stop" and frisk" that such police conduct is outside the purview of the Fourth Amendment because neither action rises to the level of a "search" or "seizure" within the meaning of the Constitution. We emphatically reject this notion. It is quite plain that the Fourth Amendment governs "seizures" of the person which do not eventuate in a trip to the station house and prosecution for crime—"arrests" in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person." *Id.* at 16.

Thus, since all seizures of the person, are governed by Fourth Amendment standards, the "reasonableness" of Officer Adcock's prolonged seizure of Mr. Hamilton must be evaluated in the case at bar.

Mr. Hamilton was stopped by Officer Adcock for speeding and on suspicion of driving a stolen automobile (T3, 8-24). When asked for his license and registration, Mr. Hamilton produced two notarized slips of paper. One slip of paper read "Reported Registration missing" and the other read: "Reported-License missing" (T4, 9-17). The license plate numbers on the slips of paper were the

same as the license plate numbers on Mr. Hamilton's car at the time he was stopped (T27, 7-8).

Mr. Hamilton was asked for other identification, but he explained that his wallet has been stolen at the same time as his license and registration.

The police officer then asked Mr. Hamilton to open the glove compartment. When Mr. Hamilton complied with this request, officer Adcock found an expired Pennsylvania permit in Mr. Hamilton's name and an expired registration card. The registration card described the vehicle which Mr. Hamilton was driving, except that the license plate number was different (T5, 11-20). Mr. Hamilton explained that new plates had been issued subsequent to the expiration date of the registration card (2T25, 6-18). The registration card indicated that Mr. Hamilton was the owner of the motor vehicle (2T12, 3-5).

At this point, the reasonable course to pursue, would have been for Officer Adcock to check the serial number of the registration card with the serial number on the car. This would have established whether the registration card was for the vehicle that Mr. Hamilton was presently driving.

Once this step had been taken, Officer Adcock would have discovered that the registration card was for the vehicle that Mr. Hamilton was driving and that it was registered in Mr. Hamilton's name. Furthermore, the "clean license plates" which Officer Adcock found so intriguing would have been clearly explained. In sum, by pursuing this course, Officer Adcock would have expeditiously discovered the information he was allegedly seeking, *i.e.* was Mr. Hamilton operating a stolen motor vehicle? Furthermore, this information would have been gained with only a limited search and minor intrusion into the personal effects

of Mr. Hamilton. Moreover, the seizure of Mr. Hamilton would have been for a limited and reasonable period of time.

But the above course of conduct did not, apparently, occur to Officer Adcock until: (1) Mr. Hamilton's trunk had been thoroughly searched; (2) The contents of a box in the trunk had been examined; (3) Mr. Hamilton had been patted down; (4) Mr. Hamilton had been ordered to roll up his sleeves; and (5) Further police assistance arrived on the scene.

It is submitted that the Fourth Amendment forbids the seizure of Mr. Hamilton while the above listed procedures and intrusions were executed. Officer Adcock acted unreasonably in detaining Mr. Hamilton for such a prolonged period of time, since an alternative method of establishing ownership of the automobile was clearly available; and this alternative could have been executed with a minimal and reasonable degree of interference with Mr. Hamilton's personal security and privacy.

It is now fundamental that any evidence obtained through an illegal search or seizure cannot be used in a criminal proceeding. *Mapp v. Ohio,* 367 U.S. 643 (1961). Furthermore, direct and indirect products of such illegal invasion must also be excluded. *Wong Sun v. United States,* 371 U.S. 471, 484-485 (1963).

In the present case, the discovery of the heroin under the dashboard of Mr. Hamilton's car, occurred during the unreasonable and illegal detention of Mr. Hamilton. In this sense, the discovery of the heroin was a product of the unreasonable and illegal seizure of Mr. Hamilton and must be excluded.

It should be noted, that the discovery of the heroin became "fruit of the poisonous tree" only because of the

unreasonable course of conduct chosen by Officer Adcock. That is, if Mr. Hamilton had not been unreasonably seized, and had Officer Adcock checked the serial number immediately upon discovering the expired registration card, the "poisonous tree" doctrine would be inapplicable.

But Officer Adcock chose an unreasonable course of conduct. As a result, by the time the heroin was discovered, Mr. Hamilton was under an illegal restraint. Absent the illegal detention, Mr. Hamilton could have driven away from the scene. Thus, the discovery of the heroin was a direct product of an illegal seizure of Mr. Hamilton and must be excluded from evidence. *Wong Sun v. United States, supra.*

Nor can it be argued that the search of the trunk and subsequent discoveries therein provided a reasonable basis for further detention of Mr. Hamilton. This argument fails because the search of the trunk was illegal, (See Point 3, *infra*) thus precluding the use of the fruits of said search as a basis for any further intrusions into the personal security of Mr. Hamilton (see *Wong Sun v. United States, supra*).

Point II

The discovery of heroin cannot be justified by the "plain view doctrine," since the police officer was in the place of observation on a pretext.

The facts of this case reveal that Officer Adcock stopped Mr. Hamilton for speeding and on suspicion of driving a stolen vehicle (T3, 8-24). After not receiving evidence to his satisfaction that Mr. Hamilton was the owner of the car, and after failing to pursue reasonable

measures to determine ownership of the car (see Point I, *supra*), Officer Adcock employed a "trick." The alleged purpose of this trick was to determine if Mr. Hamilton was familiar with the contents of the trunk (T11-12 to T12-3).

After asking Mr. Hamilton what the trunk contained, Officer Adcock opened the trunk to verify Mr. Hamilton's answer. Officer Adcock observed exactly what Mr. Hamilton had said the trunk contained, including six cardboard boxes. Officer Adcock opened one of the six boxes and found that it contained empty glassine envelopes (T25, 3-7).

It should be noted that Mr. Hamilton "passed his test." Officer Adcock's trick had demonstrated that Mr. Hamilton was familiar with the contents of the trunk. Officer Adcock stated on direct examination that "you can pretty well assume the car is theirs," if the "test" is passed (T8, 11-12).

Nevertheless, Officer Adcock radioed for assistance (T9, 20-24). At this point, it should be clear that Officer Adcock was now investigating the possibility of illegal drug traffic. While waiting for assistance to arrive, Mr. Hamilton was patted down and ordered to roll up his sleeves (2T15, 13-19).

On direct examination, Mr. Hamilton testified that Officer Adcock and the arriving police officers summarily searched the car and told him to "shut up" and "don't move" (2T15-14 to 2T16-24).

Officer Adcock testified that upon the arrival of assistance, he decided to check the serial number of the car (T10, 1-18). While looking at the serial number on the door jamb, Officer Adcock testified that he observed a brown paper bag under the dashboard. Through a rip in the bag, he observed a glassine envelope containing a white

substance (T10, 18-22). The bag was removed and Mr. Hamilton was placed under arrest (T10-23 to T11-1).

It is well settled that objects falling in the "plain view" of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence. (See cases cited ANNO. 29 L.Ed2d 1067, 1070 (1971.)

But in the present case, Officer Adcock was not in the viewing position for the purpose of checking the serial number. Clearly, this check could have been made long before assistance arrived. Furthermore, Mr. Hamilton had apparently passed his "ownership tests," by the time the serial number was checked.

Officer Adcock's conduct subsequent to the discovery of the empty glassine envelopes in the trunk, clearly indicates that his primary concern became the investigation of illegal drug traffic. After finding the empty glassine envelopes, Officer Adcock radioed for assistance, patted down Mr. Hamilton and ordered Mr. Hamilton to roll up his sleeves (T9, 20-24); (2T15, 13-19).

Upon the arrival of assistance, Officer Adcock was clearly not investigating a possible stolen motor vehicle, for this he could have done without assistance. Rather, Officer Adcock was now looking for evidence of illegal drug traffic. Thus, when he opened the door to Mr. Hamilton's car, squatted down and flashed his light in the general direction of the door jamb, he was in that position on a pretext. Although ostensibly checking the serial number of the car, Officer Adcock was looking for drugs.

In these circumstances, it is submitted, that the "plain view" doctrine is inapplicable. The legal "right" to be in a certain position should not be exploited by a police officer in order to make observations unrelated to the legal justification for being in the viewing position.

The suppression of evidence has been required in other circumstances because of pretext activities by police officers. For instance, when an arrest is made solely for the purpose of discovering evidence to support another charge, such an arrest is illegal and any evidence obtained as a result must be suppressed. *Henderson v. United States*, 12 F.2d 528 (4th Cir. 1926); *Worthington v. United States*, 166 F.2d 557 (6th Cir. 1948); *Taglavore v. United States*, 29 F.2d 202 (9th Cir. 1961).

In *Taglavore v. United States, supra*, police officers used a warrant for a minor traffic violation as a pretext to arrest the defendant to enable them to search for narcotics which they believed were in his possession. The court held that the police had "engaged in a deliberate scheme to evade the requirements of the Fourth Amendment by using a traffic arrest warrant to search the appellant for narcotics they suspected were on his person." *Id.* at 267. Consequently, the evidence was suppressed.

In the case at bar, Officer Adcock's conduct after the discovery of the glassine envelopes, clearly demonstrates his purpose in opening the front door of Mr. Hamilton's car, squatting down and flashing his flashlight in the general direction of the serial number. On cross-examination, Officer Adcock admitted that upon seeing the paper bag, he was "looking for narcotics."

It seems clear that upon finding the glassine envelopes in Mr. Hamilton's trunk, Officer Adcock became determined to discover evidence of illegal drug traffic. On cross-examination he was asked if he had decided to search the entire car, upon discovery of the glassine envelopes in the trunk. Rather than answer this question directly, Officer Adcock responded "it wasn't necessary" (T34, 8-15). Although it would be unfair to deduce from this response that upon finding the glassine envelopes Mr. Hamilton's

entire car was searched or would have been searched, this evasive response does tend to demonstrate that Officer Adcock's motive in putting himself in a position to observe the serial number, was to search for evidence of illegal drug traffic.

It is respectfully submitted that this Court should not sanction the exploitation of the "plain view" doctrine. The Court must look beneath the surface facts to the motivations of police officers in placing themselves in viewing positions. Otherwise, the protections of the Fourth Amendment may be easily eroded. As noted above, the motives of a police officer in making an arrest have been examined by lower Federal Courts. It is urged that this court undertake a similar examination in the case at bar, and suppress the evidence.

Point III

The search of the trunk and the cardboard box contained therein was unconstitutional.

A. *There was no consent to the search of the trunk and the cardboard box contained therein.*

The events preceding the opening and search of Mr. Hamilton's trunk have been thoroughly discussed above. See Point I; Point II. Briefly stated, the following occurred: 1. Mr. Hamilton was stopped and asked for his license and registration; 2. Mr. Hamilton produced two notarized slips of paper indicating that his license and registration had been stolen; 3. An expired Pennsylvania permit and expired registration card both in Mr. Hamilton's name, were found in the glove compartment by Officer Adcock; 4. The expired registration card contained a perfect description of the car driven by Mr. Hamilton, except for the license plate number.

After the above events transpired, Officer Adcock asked Mr. Hamilton to open the trunk, for the alleged purpose of determining whether Mr. Hamilton's keys fit the trunk lock. Mr. Hamilton complied with this request by opening the trunk approximately four or five inches and then closing it (2T13, 14-19). Apparently seeking further proof of ownership, Officer Adcock then employed what he characterized as a "trick" (T11-12 to T12-3). He asked Mr. Hamilton what was in the trunk. Mr. Hamilton replied that the trunk contained a jack, spare tire, six small cardboard boxes and other miscellaneous items. Officer Adcock then re-opened the trunk and found exactly what Mr. Hamilton had said the trunk contained.

After verification of the trunk's contents, Officer Adcock's attention became focused on the cardboard boxes. After a brief conversation with Mr. Hamilton concerning the contents of the boxes, Officer Adcock ordered Mr. Hamilton to open one of the boxes (2T15, 3-7). When Mr. Hamilton refused, Officer Adcock broke the tape on one of the boxes and pulled it open (2T15, 8-12). He discovered that it contained empty glassine envelopes (T9, 6-21).

It is well settled that an exception to the requirement of a warrant or probable cause, is a search conducted pursuant to consent. *Davis v. United States*, 320 U.S. 582, 593-594 (1946); *Zap v. United States*, 328 U.S. 624, 630 (1946). But, when a prosecutor seeks to rely upon consent as justification for a search, he has the burden of proving that the consent was freely and voluntarily given. *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968).

Analysis of the record in the present case demonstrates that the State has not met its burden. The evidence shows that Mr. Hamilton did open his trunk voluntarily, but only four or five inches for the express purpose of demon-

strating that his keys fit the lock. Officer Adcock, apparently not satisfied, then employed his "trick" to re-open and search the trunk. He asked Mr. Hamilton what was in the trunk and then simply opened the trunk and inspected the contents (T8, 6-7). Officer Adcock received no permission for this intrusion into the personal effects of Mr. Hamilton, nor did he ask for Mr. Hamilton's permission. It should also be noted that Mr. Hamilton was not told that he had a right to forbid Officer Adcock from inspecting the trunk.

At the hearing on the motion to suppress, Judge Galda made the following observation with regard to the search of Mr. Hamilton's trunk:

> "I had a little difficult problem, a little more difficult problem with respect to the trunk, and this Court suggests that if this is a common practice among the police department operating in our jurisdiction, it is frowned on because, concedely, it is a *device coercive in nature*, and as candidly referred to by the police officer as trickery and under ordinary circumstances should be avoided. Because it would seem to this Court that a defendant who is not informed that a search of a trunk would not be made if he did not consent, did not and could not intelligently and voluntarily consent to a search of the automobile from which incriminating evidence may be found. I think this is the language of the Fourth Amendment" (2T92, 3-17). (Emphasis added.)

This court has recently stated that the issue of consent to a search should be analyzed as follows:

> "(T)he question of whether a consent to a search was in fact 'voluntary' it was the product of duress and coersion, express or implied, is a question of fact to be determined from the totality of all the circumstances. While knowledge of the right to refuse

> is one factor to be taken into account, the government need not establish such knowledge as the sine quo non of an effective consent." *Schneckloth v. Bustamonte*, 41 L.W. 4726, 4728 (1973).

The totality of the circumstances surrounding the case at bar demonstrates that Mr. Hamilton did not voluntarily consent to the search of his trunk. Practically speaking, Mr. Hamilton had no choice but to stand by while Officer Adcock investigated the trunk. Judge Galda's observation that the police officer's conduct was "coercive in nature" should be given due consideration, with the resulting conclusion that Mr. Hamilton did not consent to the search of his trunk.

Assuming *arguendo* that Mr. Hamilton did consent to Officer Adcock's opening of the trunk, Officer Adcock went beyond the scope of the consent in breaking open one of the cardboard boxes, and checking its contents. This position is reinforced by the fact that the alleged purpose for opening the trunk was to establish whether Mr. Hamilton owned the automobile. Once Officer Adcock saw the six cardboard boxes inside the trunk, Mr. Hamilton's description of the trunk contents was verified. Mr. Hamilton could not have anticipated that once the trunk was opened, Officer Adcock would intensify the intrusion and open one of the boxes. Thus, Mr. Hamilton could not have consented to this search of the cardboard box, prior to the opening of the trunk. Since there is no evidence to suggest that Mr. Hamilton ever consented to the opening of the cardboard box, there appears to be no justification for the search.

B. *The search of the trunk and box contained therein cannot be justified as limited search to determine ownership of the car since exigent circumstances did not exist.*

In New Jersey, a limited search of a vehicle for evidence of ownership has been held justified when a driver fails to produce adequate proof of registration. *State v. Boykins*, 50 N.J. 73 (1967). However, in the case at bar, Officer Adcock made no effort to limit the scope of his inquiry. Rather, he far exceeded the bounds of the limited search which may be justified to establish proof of ownership.

Officer Adcock testified that his attention originally became focused on Mr. Hamilton's car because it was dirty and had clean license plates (T3, 8-9). When Officer Adcock asked for Mr. Hamilton's license and registration, Mr. Hamilton explained that they had been stolen, along with his wallet. This explaination was verified by two notarized slips of paper (T4, 3-17).

Officer Adcock searched the glove compartment, findin an expired Pennsylvania permit and registration. The registration was for a motor vehicle of the same type as Mr. Hamilton's except for a different license plate number (T5, 13-16). At this point, it would seem elementary that Officer Adcock would deduce that the clean license plates had been issued with a new registration, and that the expired registration was, in fact, the expired registration for the car which Mr. Hamilton was driving. This obvious explanation could have been verified by simply checking the serial number of the car. However, rather than take this reasonable course of conduct, Officer Adcock decided to investigate and search the trunk of Mr. Hamilton's car.

It is well settled that only exigent circumstances justify a warrantless search, absent consent. *Chambers v. Maroney*, 399 U.S. 42 (1970). It cannot be fairly stated that such circumstances existed in the present case, prior to Officer Adcock's search of Mr. Hamilton's trunk. This is a fair statement since Officer Adcock had available the obvious course of checking the serial number of the car against the serial number on the expired registration card. Furthermore, law enforcement personnel undoubtedly have other sources of checking the ownership of the motor vehicles, which do not require the substantial intrusion involved in the case at bar. Thus, it cannot be said that the exigencies of the situation compelled the search here involved, when obvious courses of conduct were available, which would have involved much lesser intrusions into an individual's privacy. Therefore, the search of the trunk cannot be justified as a limited search for the purpose of ascertaining ownership of the motor vehicle.

Assuming *arguendo* that opening the trunk and checking the contents was justified to establish ownership, ripping open one of the cardboard boxes was a substantial intrusion and clearly unjustified.

Considering the alternative courses of conduct available to determine ownership, and after evaluating the limited, if any, additional evidence of ownership discoverable by opening one the boxes, it can be concluded that the interest of Mr. Hamilton in his own privacy clearly outweighs any interest Officer Adcock may have had in opening the box. Thus, there were no exigent circumstances justifying the warrantless search of the cardboard box.

C. *The search of the trunk and the cardboard box contained therein cannot be justified as a search incident to an arrest.*

The search of the trunk and the ripping open of one of the cardboard boxes contained therein, cannot be justified as a search incident to arrest.

In the first instance, Mr. Hamilton was not under arrest at the time of the above mentioned search. See (T10-23 to T11-1). Absent unusual circumstances an actual arrest must precede a search incident to arrest. See, *Cupp v. Murphy*, 41 L.W. 4748 (1973).

Secondly, the search involved herein, far exceeded the permissible scope of a search incident to arrest. In *Chimel v. California*, 395 U.S. 752 (1969) this Court established the scope and underlying justification for a search incident to arrest. Clearly, under this doctrine, the search of Mr. Hamilton's trunk and the cardboard box contained therein, cannot be justified as search incident to an arrest.

Point IV

The discovery of heroin under the dashboard was the fruit of the illegal search of the trunk, thus necessitating the exclusion of the heroin from evidence.

In Point III it has been established that the search of Mr. Hamilton's trunk and the cardboard box contained therein, was violative of his constitutional rights.

After conducting the unconstitutional search, Officer Adcock: (1) radioed for assistance (T9, 20-24); (2) searched or patted down Mr. Hamilton (2T15, 13-19); (3) forced Mr. Hamilton to roll up his sleeve (2T15, 13-19).

When assistance arrived on the scene, Officer Adcock testified that he decided to check the serial number of Mr. Hamilton's car. While looking at the serial number Officer Adcock testified that he noticed a ripped brown paper bag under the dashboard (T10, 1-18). He testified that, through the rip, he was able to observe a glassine envelope containing a white substance (T10, 18-22).

Mr. Hamilton, however, testified that once assistance arrived, a general search of the car ensued (2T16, 4-24). Furthermore, Mr. Hamilton testified that a person checking the serial number could not possibly see under the dashboard (2T17-5 to 2T18-1).

Apart from this factual dispute, it is submitted that Officer Adcock's observation of the bag and perception of a glassine envelope containing a white substance, were fruits of the illegal search of the trunk, and must, therefore, be excluded from evidence. *Wong Sun v. United States, supra.*

This position is substantiated by an analysis of Officer Adcock's behavior after finding the glassine envelope in the trunk. First of all, he radioed for assistance (T9, 20-24). He then searched or patted down Mr. Hamilton (2T15, 13-19) and forced him to roll up his sleeves (2T15, 13-19). These actions were taken, in spite of the fact that the possibility of a stolen motor vehicle must have been substantially lessened since Mr. Hamilton accurately described the contents of the trunk thus passing Officer Adcock's "test" or "Trick."

It, thus, rather obviously appears that Officer Adcock, upon finding the glassine envelopes, was no longer primarily concerned with a motor vehicle violation or a possible stolen automobile. Rather, in the mind of Officer Adcock, the situation had developed into one of possible illegal drug traffic.

When Officer Adcock was squatting down and checking the serial number on the door jamb, his perceptions and entire outlook were quite different as a result of the illegal search of the trunk. It is submitted that Officer Adcock probably would not have even seen the paper bag under the dashboard, had the situation remained one of investigating the possibility of a stolen motor vehicle. But because Officer Adcock had become illegally sensitized to the possibility of illegal drug traffic, he not only observed the bag, but perceived its contents through a small rip. He admitted, on cross-examination, that he was looking for drugs upon seeing the brown paper bag (T34, 5-7). It is highly doubtful that this nearly super-human perception of the contents of the bag, would have been made, absent the illegal search and resulting investigation of illegal drug traffic.

Thus, it is submitted, that the contents of the paper bag were wrongfully admitted into evidence. It is now fundamental that any evidence obtained through an illegal search cannot be used in a criminal prosecution. *Mapp v. Ohio*, 367 U.S. 643 (1961). Furthermore, not only is the illegally seized evidence to be excluded at trial, but the evidence shall not be used at all, this excluding the direct and indirect products of such illegal intrusions. *Wong Sun v. United States, supra.*

In the circumstances of the present case, it is submitted that the observation of the paper bag underneath the dashboard and the subsequent perception of its contents through a small rip, were the result of the illegal search of Mr. Hamilton's trunk, thus constitute a use of illegal evidence in violation of the Fourth and Fourteenth Amendments. *Mapp v. Ohio, supra; Wong Sun v. United States, supra.*

CONCLUSION

For the above reasons, a writ of Certiorari should be granted.

Respectfully submitted,

/s/ Richard Aronsohn
RICHARD ARONSOHN
Attorney for Petitioner

SUPERIOR COURT OF NEW JERSEY

Bergen County—Law Division

September Term A.D. 1971

First Stated Session

STATE OF NEW JERSEY

vs.

RICHARD T. HAMILTON,

Defendant.

Appendix A

Indictment No. S-1469-71

The Grand Jurors of the State of New Jersey, for the County of Bergen, upon their oaths present as a

FIRST COUNT

that RICHARD T. HAMILTON on or about the 30th day of August, 1971, in the Borough of Ridgefield in the County of Bergen aforesaid, and within the jurisdiction of this court, did have and possess a controlled dangerous substance, to wit, heroin, contrary to the provisions of N.J.S. 24:21-20a(1), and against the peace of this State, the government and dignity of the same.

SECOND COUNT

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further PRESENT that RICHARD T. HAMILTON on the date at the place and in the jurisdiction set forth in the First Count herein, did have and possess, with intent to distribute, a controlled dangerous substance, to wit, heroin, contrary to the provisions of N.J.S. 24:21-19,

and against the peace of this State, the government and dignity of the same.

THIRD COUNT

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further PRESENT that RICHARD T. HAMILTON on the date at the place and in the jurisdiction set forth in the First Count herein, unlawfully carried and possessed in a vehicle, to wit, an automobile, a dangerous instrument of the kind known as a knife, contrary to the provisions of N.J.S. 2A:151-41, and against the peace of this State, the government and dignity of the same.

/s/ George F. Kugler, Jr.
GEORGE F. KUGLER, JR.
Attorney General of
New Jersey

By: /s/ Richard A. Fiore
Assistant Prosecutor

A TRUE BILL

/s/ Evelyn Nelson
EVELYN NELSON, Foreman

Oct. 20, 1971

Appendix B

Transcript on Motion to Suppress Before Bergen County Court—Criminal Division Indictment No. S-1469-71

Monday, January 24, 1972
Court House, Hackensack, New Jersey

Before: Honorable Fred C. Galda, t/a

(2) MR. SHARKEY: Your Honor, this is a suppress motion on State v. Richard Hamilton on Indictment S-1469-71.

THE COURT: Call your witness.

MR. SHARKEY: The State will call Patrolman Adcock.

ALBERT ADCOCK, called as a witness on behalf of the State, having been first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. SHARKEY:

Q Patrolman Adcock, how long have you been employed by the Bergen County Police?

A Six and a half years.

Q And were you so employed on the day of August 30, 1971?

A Yes, I was.

Q What were your duty hours on that day?

A I was working the 11 P.M. to 7A.M. shift.

Q That's 11 P.M. on the 30th to 7 A.M. on the 31st?

A No, sir. That would be 11 P.M. on the 29th, 7 A.M. on the 30th.

Q And about 4:10 A.M. on the morning of the 30th of August, did you have occasion to come into contact with the automobile of one Richard Hamilton?

A Yes, I did.

(3) Q Would you explain to the Court the circumstances surrounding that confrontation?

A At that time and date I observed a 1966 Pontiac, Pennsylvania registration, in the area of the Bridge Plaza.

Q Where is the Bridge Plaza?

A It's the joining of 46, 4 and Route 80 at the George Washington Bridge.

The vehicle caught my attention because it was a dirty car and had a brand new license on it. I followed the vehicle, went down onto Route 46 and pulled into a gas station. As a matter of fact, it was the Esso station on Route 46 westbound in Fort Lee.

I pulled into the station next to it, which would be a little further west and I waited there. The party conducted some business in the station and he came out and he went past me going down Route 46, going west on Route 46 at what I though was a high rate of speed.

I pulled out of the gas station and pursued the vehicle on 46 westbound. My speed at that time was about 75 to 80 miles an hour going down the hill.

Q You were going this fast?

A Yes, sir.

Q Was it necessary for you to go this fast to catch him?

A Yes, sir, it was.

Q All right, continue.

A He cut off (4) of 46 up onto 1 and 9—well, it's not 1 and 9, it's the ramp that leads to Route 1 and 9. I pursued him and had almost overtaken him. The light was green and he made the turn.

I turned the lights on and he came to a stop. We were on what is either known as Broad Avenue or Route 1 and 9 in Ridgefield at that time.

Q What did you do at this time?

A I stepped out of the car. The operator stepped out of the car and I asked him for his driver's license and registration.

Q And did he produce the same?

A No, he produced two slips of paper from Atlantic City, two white pieced of paper. It had "Atlantic City" across the top of it and they stated—one said, "Reported registration missing," and the other said, "Reported license missing."

Q Who had signed these pieces of paper?

A It was not a police officer, as I recall.

Q Did he have an explanation for these pieces of paper?

A He said he had lost his license and registration in Atlantic City the week before—that they had stolen them in Altantic City. I beg your pardon, he said they had stolen them in Atlantic City.

Q Did you ask if he had any other identification (5) on him?

A I asked if he had any other identification on him and he said no, his wallet was stolen at the same time.

Q What did you do subsequent to this?

A I asked him if he had anything in the car that would determine that the vehicle had belonged to him, and he said, no, he didn't have anything.

I asked him if he had insurance papers, repair slips, anything that would determine the car belonged to him or not.

Q He said no?

A He said no. I asked him to open the glove compartment of the vehicle.

Q Did he do so?

A He did.

Q What did that reveal?

A Inside the glove compartment was an expired Pennsylvania permit and a registration for a similar type vehicle but with a different plate number.

Q By a similar type vehicle, you mean another Pontiac?

A Another Pontiac.

Q But a different plate number?

A Yes.

Q Was there a serial number on that registration?

A Yes.

Q What did you do subsequent to this?

A I asked him about the license and registration because he had stated there was nothing in the car, and at the time (6) I found it he seemed to be surprised.

Q You said there was an expired license in the car or permit?

A Expired permit.

Q Continue. I'm sorry.

A He seemed to be surprised that they were found in the glove compartment.

Q And what did you do then at that time?

THE COURT: You lost me. You said he seemed to be surprised that they were found in the glove compartment?

MR. SHARKEY: Surprised that the papers were found in the glove compartment.

MR. SILVER: If your Honor please, I'm going to object to any testimony about surprise. It's conclusionary.

THE COURT: Sustain the objection. You kind of brushed over that. Get back to that glove compartment so I understand what happened.

Did this gentleman find it or did the other gentleman find it or who produced it?

BY MR. SHARKEY:

Q Starting again from the point where you asked the defendant for his license and registration, go through that again so the Judge can better understand.

A He gave me the two pieces of paper from Atlantic City which stated he had lost the registration and license from (7) Atlantic City. I asked him if there was anything that could determine who the owner of the car was since he had no identification, nothing at all, and he said, "No, I don't have anything."

So I told him, "Will you open the glove compartment?"

We walked around to the right hand side of the car. He opened the door on the right hand side, opened the glove

compartment up. I had my flashlight. Naturally, I flashed the light into the glove compartment, and laying right there was the permit and the registration that was in there and he seemed to act in a surprised manner that there was anything at all in there.

MR. SILVER: I object to that.

THE COURT: Sustain the objection. That's a conclusion on your part. Most people, when they get stopped by a cop, are startled, anyway.

MR. SHARKEY: The witness can testify as to physical manifestations as to his common knowledge. One can testify as to surprise, fear, anger because they are readily experienced.

THE COURT: Something may mean something to someone who's there for forty years and someone like me may get a different idea.

MR. SHARKEY: That's not instrumental to our case, in any event. I just wanted to state (8) that for the record.

BY MR. SHARKEY:

Q What happened then?

A I asked him if he could tell me exactly what was in the trunk of the vehicle, exactly the items that were in the trunk of the vehicle.

Q What was the purpose of this question?

A This was a policy or it's a think that you do. It's a quick way to find out if somebody owns the car or not by asking them if they've had the car a while what's in the trunk. If they can name the items in the trunk, you can pretty well assume the car is there's. It's not positive, but it gives you a good indication of which direction you're going to go.

THE COURT: So, in other words, at this point you had some suspicion as to the ownership of the car?

THE WITNESS: Yes, sir.

THE COURT: All right.

A (Continuing) I asked him for the keys which he had in his hand. He gave me the keys for the car.

I looked at the keys and I could see they were not the original General Motors blanks that were used. They were keys that are duplicates or keys other than General Motors original blanks.

(9) I walked to the rear of the car and I don't know if I opened the trunk or he opened the trunk. The trunk was opened and he had mentioned before this when I asked him what was in the trunk, among the other items, a spare tire, tire, a jack and six small boxes.

I opened up the trunk. There were six boxes in the trunk, six small boxes in the trunk.

Q About what size were these boxes? You say they were small.

A Approximately 8 by 6 or 8 by 8 inches square.

Q All right.

A One of the boxes—I asked him what was in the boxes and he told me they were small bags that were used for packaging garlic seeds and things of that nature.

I said, "By small bags, do you mean glassine envelopes?"

He said, "Not small glassine bags; small bags used for packaging garlic seeds."

Q Did you open a box?

A One of them was open.

Q What did you see?

A Glassine envelopes. At this time I had him stand away from the car and I called for assistance.

Q Did assistance come?

A I just stood by until the assistance arrived on the scene.

Q Who arrived?

A Officer Love.

(10) Q What did you do after Officer Love arrived on the scene?

A I walked back to the car and I opened the driver's side door—or I don't remember whether it was opened or I opened it. I squatted down to check the serial number against the registration that I had.

Q Where is the serial number on the 1966 Pontiac?

THE COURT: You mean the broadcast number? What number are you talking about?

MR. SHARKEY: The serial number, your Honor. The one that would appear on the registration.

A The serial number is located on the lower portion of the door jamb in a recessed area.

Q On the driver's side

A On the driver's side.

Q What did you observe at this time?

A I squatted down, got my flashlight out to check the serial number. While I was looking at the serial number plate, I looked up eye level and in the center of the dashboard was a bag, a paper bag, and the bag was ripped and inside the bag I could see what appeared to be a glassine bag or wrapping with a white substance in it.

Q Did you remove that substance from the automobile?

A Yes, I did.

Q Was the defendant placed under arrest?

(11) A Yes, he was.

Q At what time was he placed under arrest and advised of his rights?

A The original stop was at 4:10. Approximately 4:20.

Q This was after you noticed the bag. How was this bag hanging on the inside of the automobile?

MR. SILVER: He didn't say it was hanging.

Q How was this bag positioned on the inside of the automobile?

A The lip of the dashboard curves down and right on the bottom of that in the center by the ashtray is a space and the bag was stuck under there.

THE COURT: Let me ask you this, Mr. Adcock, since I don't know whether I understood you completely: You asked this gentleman, Mr. Hamilton, I take it, that if he could tell you what's in the back of the trunk you could determine possible ownership?

THE WITNESS: No, your Honor. It's just that when I asked him what was in the trunk using the trick, if you want to call it that, of looking in the trunk to find out what objects are in there so you could get an idea of whether the person owns the car or not or whether they have had the car for a while. Not whether they own it so much, but whether they have had it.

(12) THE COURT: And this is a trick?

THE WITNESS: I called it a trick. It's a—

THE COURT: He said, "Here's the key to my trunk," and "Go in"?

THE WITNESS: I asked him for the keys.

THE COURT: And he gave it to you?

THE WITNESS: Yes.

THE COURT: And this is where you saw six boxes of glassine bags?

THE WITNESS: Yes.

BY MR. SHARKEY:

Q How did you have to turn your head when you opened the door to check the serial number or did you have to turn your light, for example, to see the glassine bag?

MR. SILVER: Objection.

(Discussion off the record.)

Q Patrolman Adcock, please again for the Court, tell us what happened when you opened the door of the automobile.

MR. SILVER: He said he wasn't sure whether it was opened or he opened it.

THE COURT: You said, "when you opened the door." That would mean he opened it. It makes a difference.

(13) MR. SHARKEY: We'll contend that it doesn't, Judge.

BY MR. SHARKEY:

Q But, for the record, did you subsequently go to the automobile?

Q For what purpose?

MR. SILVER: Judge, I don't know where we are right now in terms of time or space. When he went to the automobile after what?

MR. SHARKEY: After the trunk was opened.

Q Will you explain to the Court, please, what you did?

A I went back to the car. I called headquarters and asked for some assistance. Patrolman Love came on the scene.

I walked to the car. I don't know whether I opened the door or the door was open. I squatted down.

Q This is on what side of the car?

A This is on the driver's side. The serial number plate is recessed in the car. It's not on the door frame, itself; it's recessed in a hole right at the bottom almost at the floorboard level.

I squatted down to check the serial number against the registration I had with the different plate number. As I was doing that I looked—the interior lights were on and I observed subsequently the glassine bag with the white powder.

(14) MR. SHARKEY: That's all I have right now, Judge.

CROSS EXAMINATION BY MR. SILVER:

Q Officer, you said that before you stopped the defendant, he pulled out of a gas station, correct?

A Yes, sir.

Q And you say he was speeding?

A Yes, sir.

Q You had to travel 75 to 80 miles an hour to overtake him?

A Yes, sir.

Q Did you give him a ticket, a summons, Officer, for speeding?

A I don't really know, sir. I don't remember. I don't have it written down here whether I did or not.

Q You don't know?

A I don't know.

Q Don't you have any record of whether or not you issued a summons?

A Yes, I have, but I don't have them with me.

Q You didn't bring your records to court?

A I brought my records on the arrest to court. I didn't bring any motor vehicle records with me, no, sir.

Q Wouldn't a traffic summons be a part and parcel of this case, Officer?

A No, sir, not as far as my officer's report is concerned.

(15) Q Do you have any independent recollection of these circumstances aside from your report?

A Aside from I should have given him a summons, no.

Q You didn't give him a summons, did you?

A I told you I don't know.

Q Are you reading from a report, Officer?

A I'm looking through it to see if I can answer your question.

Q All right. Take your time.

MR. SHARKEY: I fail to see what relevancy it is whether Patrolman Adcock issued a summons for speeding.

THE COURT: He is asking him the question.

MR. SHARKEY: I fail to see the relevancy.

THE COURT: It may or may not. It may go to credibility. It's an indication he was speeding, that it didn't come as an afterthought.

Well, let's see. I don't know. He has a right to ask the question.

A In this report on the doctor's report there is no mention of my issuing a summons.

Q Now, when you stopped him, you said, Officer, that he produced two pieces of white paper?

A Yes, sir.

Q From Atlantic City?

A Yes, sir.

(16) Now, what were these papers?

A I don't know, sir. I never saw anything like them before.

Q What were they?

A Two pieces of paper.

Q What did they say?

A They said, "Atlantic City, New Jersey. This is to"—words to the effect of "This is to determine that Richard Hamilton lost his driver's license in this city," and the other one said "his registration in this city."

Q And they explained the fact that he was without license and registration?

A Not to my satisfaction, no, sir.

Q Well, subsequent events bore out proof that this was not a stolen vehicle, was it?

A That's correct.

Q The vehicle was ultimately returned to the defendant?

A I don't know, sir.

Q You don't know?

A No, sir.

Q Did you take these two pieces of white paper?

A No, sir. They were his personal property.

Q Well, you arrested him, did you not?

A Yes, sir.

Q He kept the—

A They were put into his personal property and returned to him.

(17) Q They had to be taken from him before they could be returned to him, did they?

A Yes, sir.

Q Did you take them?

A I took all of his personal property.

Q You did?

A Yes, sir.

A And subsequently you returned these two pieces of white paper?

A Yes, sir.

Q Now, the papers said that his license and registration had been stolen, did they not?

A Words to that effect, yes, sir.

Q Well, at the time—in your opinion were these official documents?

A No, sir.

Q You say they came from Atlantic City?

A They had "Atlantic City" written across the top.

Q Who were they signed by?

A I don't know.

Q Did you look?

A I looked, yes.

Q Were they sealed?

A No, sir, not as far as I recall.

Q You don't recall?

A No, sir, I don't know if they were sealed or not.

Q Did you question the defendant further with respect to the fact that he didn't have a license or registration?

A Yes, sir.

Q Did he explain to you that his vehicle had been (18) stolen?

A No, sir.

Q Did he explain that his vehicle had been burglarized?

A I believe he said that his wallet was stolen from the vehicle.

Q And did he tell you that his wallet contained his license and registration?

A He told me his wallet contains identification. I don't know whether he said anything about his license and registration.

Q Did he attempt to explain to you that these documents from Atlantic City were proof that his license and registration were stolen?

A Yes, sir.

Q He explained that to you?

A Yes, sir, he did.

Q Now, you say you engaged in what according to your own terms is a trick of the trade. I guess you asked him what was in the trunk, right?

A Yes, that's correct.

Q And he told you what was in the trunk?

A Basically, yes, sir.

Q Now, you say that he opened the trunk?

A One of us opened the trunk.

Q You don't remember which one?

A No, I don't.

Q You further testified that the keys were not an original G. M. blank?

A Yes, sir, that's (19) correct.

Q Did you try the keys in the trunk, Officer?

A I don't recall whether I opened the trunk or he opened the trunk.

Q Didn't you ask him to open the trunk?

A I don't know whether I opened the trunk or I asked him to open it. It was one or the other.

Q Wouldn't a good way to find out whether keys matched the automobile that was being driven be to turn the ignition, see if the keys fit the ignition?

A I know they did. He took them out of the ignition.

Q Would it matter whether they are original G. M. make or not?

A Would it matter in respect to what, sir?

Q Well, you made a statement that you noted that the keys were not an original G. M. set.

A Yes, sir.

Q Couldn't they have been a set—a second set?

A They could have, yes, sir.

Q People drive with a second set of keys, correct?

A Oh, yes, sir.

Q People lose their keys, get new keys made?

A Yes, sir.

Q That in and of itself isn't suspicious, is it?

A In my mind combined with other things it is suspicious, (20) yes, sir.

Q The question was that in and of itself isn't suspicious, is it?

A In itself, no, sir.

Q Officer, you testified that you instructed the defendant to open his glove compartment?

A Yes, sir.

Q Officer, I have a photostatic copy of a police report which purports to be yours which has been signed by you.

I apologize for the underlinings and my own notations here. You can refer to your own report, if you wish.

Now, I'm looking at the first page, Officer, the last sentence. The report states, does it not, Officer, that the subject, meaning defendant, asked to open the glove compartment to see if ownership of the vehicle could be positively established.

Then that's contrary with your testimony here today that you instructed him to open his glove compartment?

A No, sir, it's not.

Q It's not?

A No, sir.

Q I'll read it again. "The subject asked to open the glove compartment," et cetera.

A Yes, sir.

Q Didn't you testify that you instructed him to open his glove compartment?

A Yes, sir, that's what I testified to. That's what it says.

Q You say the report is the same as your testimony?

(21) A That's correct, sir.

Q This report where the subject asked to open the glove compartment is consistent with your testimony that you told him to open the glove compartment. You don't see any difference?

THE COURT: The subject was asked to open the glove compartment.

MR. SILVER: No, sir. The subject asked to open the glove compartment.

A It was implied. It can be interpreted either way. What was implied was that I asked him. I should have said the subject was asked.

Q You wrote the report?

A Yes.

Q This is your language?

A That's what I meant when I wrote that line in there.

Q All right. Now, when someone, we don't know who, opened the trunk—strike that. You say it's usual procedure to ask someone what's in their trunk, right? You testified that it's a trick in the trade to ask people what's in their trunk; is that correct?

A Under certain circumstances, yes, sir.

Q Well, is it also usual procedure to open the trunk?

A How would you know whether they were telling the truth or not if they didn't open the trunk?

Q I don't know. It's not my trick; it's yours. (22) In all cases you ask someone to open the trunk to check against what he told you?

A When you say, "In all cases," what do you mean by all cases?

Q In all cases in which you stop a vehicle under what you conceive to be suspicious circumstances.

A Not always, no. Sometimes you do; sometimes you don't. Sometimes you use something else.

Q You use something else?

A This was a Pennsylvania registered car. It's difficult to do anything but that.

Q Well when the trunk was opened, the key must have fit, correct?

A That's correct, yes, sir.

Q So there was no question about the key belonging to the vehicle, was there, at the time the trunk was opened?

A There is no question that the key belonged to the lock to fit. Whether the lock belonged to the vehicle or not, I don't know.

Q You had no reason to suspect that it didn't?

A No, sir.

Q And the key also fit the ignition?

A Yes, sir.

Q Now, the defendant told you, according to your testimony that there was a spare tire, a jack and some boxes in the trunk, correct?

A Yes, sir.

Q And there were six boxes when you looked in (23) there?

A Yes, sir.

Q Did you have a flashlight in there?

A I think so, yes.

Q Now, is it your testimony that one of the boxes was open?

A Yes, sir.

Q One of the six?

A Yes, sir.

Q Describe how it was open.

A What do you mean describe how it was open?

Q What did it look like when you first saw it?

A I don't think I understand what you mean.

Q You saw six boxes.

A That's right.

Q One of them was open?

A Right. Five were sealed, let me put it to you that way.

Q When you say open, you mean unsealed?

A Unsealed.

Q What was in that box that was not observable to you when you first looked in the trunk?

A I don't know whether it was observable to me when I first looked in the trunk or after I shuffled through the boxes to count how many were there.

Q Did you open it?

A No, I didn't open it.

Q Well, in a usual case a box has four folds on the top; that's how it's sealed?

A Right.

(24) Q And I take it from your testimony that these four flaps were closed. You couldn't look into the box, right?

A I think they were. Yes, I believe they were.

Q And somehow they got open because you saw glassine bags in there, empty glassine bags, right?

A Yes, I would say that's correct.

Q How did they get open? Did you open them—it, the one box? Did you open it?

A We got into a conversation about what was in the boxes, whether they were glassine bags, they were envelopes or what they were.

Q You're getting ahead of me.

A Yes.

Q This is before that box was open. Did you have a conversation with the defendant about what was in it?

A Yes, I did.

Q You asked him what's in that box, right?

A Right.

Q And he told you garlic seed?

A Envelopes for garlic seed.

Q And you pursued this because you couldn't see into that box, right, at that point, Officer?

A No, sir.

Q You don't know if there were glassine bags in (25) the box at that time or garlic seeds or geraniums or anything else; is that right?

A That's right.

Q Did you open it?

A I guess I did, yes.

Q You didn't ask the defendant to open it. You opened it, yourself, right?

A As I recall, I probably opened it, myself.

Q There was no evidence of a controlled dangerous substance in any of these bags?

A I don't know, sir. You mean at that time?

Q Right. We're in the trunk now.

A No.

Q Nothing, just bags?

A That's right.

Q Then you went back to your car and called for help?

A Right.

Q And then you went—when help arrived you went back to defendant's vehicle?

A That's right.

Q Where was he at the time?

A He was standing behind me.

Q He had gotten out of the vehicle?

A He never was back in it again.

Q When did he get out?

A He got out when I stopped him.

Q Did you search the person then?

(26) A Did I search the person then?

Q His person, yes.

A No, sir.

Q You didn't roll up his sleeves?

A Did I roll up his sleeves when? When I stopped him?

Q Yes.

A No, sir.

Q At no point did you search his person?

A I may have patted him down after I found the glassine bags, yes.

Q You may have patted him down to find—

A After I found the glassine bags.

Q You didn't look at his arms?

A At that time I don't recall doing it, no.

Q You're not sure?

A I don't think I did, no. I might have. I don't believe I did, though.

Q And you came back to the car. Other police officers were there now, right?

A When was this?

Q After assistance arrived, right?

A Yes.

Q You went back to the car and now you wanted to check the serial number?

A That's right.

Q You didn't check the serial number, though, when you first stopped the car, did you?

A Did I check it for what?

Q Did you check it, for instance, as against the (27) slip of paper from Atlantic City that said that the defendant's registration had been stolen?

A I don't recall the serial number being on that piece of paper.

Q It might have been?

A It might have been, but I don't recall it being on there. The registration, yes; the serial number, I don't believe so.

Q Did the registration number check out with his license number?

A Yes. Yes, it did.

Q This was the license plate that I think you said was clean, but the car was dirty?

A That's right.

Q That's not unusual, is it?

A Yes, it is.

Q Aren't you supposed to be able to read a license plate?

A It's unusual for people just to clean their license plates.

Q Then you wanted to check the serial number?

A Yes.

Q And you say it's recessed in the floor?

A It's recessed in the door jamb.

Q Door jamb?

A Yes.

Q Near the floor part of the car?

A Near the floor of the car.

Q And you got down on your knees?

A I squatted down.

(28) Q You squatted down with a flashlight and the light was directed at the door jamb, right?

A It was directed at the serial number plate, yes, sir.

Q It wasn't directed up at the dashboard?

A No, sir.

Q Where was this bag that you made reference to? Where was that located?

A In the center of the vehicle under the dashboard.

Q So that would be in the center of the vehicle?

A Yes, sir.

Q You would have to change the direction of your flash to see that?

A No, sir.

Q You were looking for the serial number?

A Yes, sir.

Q What, did this bag catch your eye?

A Yes, sir.

Q Was this bag open?

A It was split.

Q Split?

A Yes.

Q Well, could you describe, Officer, the way a dashboard in this vehicle is constructed? Do you understand my question?

A I think so. The vehicle—mostly all General Motors cars are constructed where it's bent over so there's no sharp edges. It forms a ledge almost underneath the driver.

(29) Q Away from the driver, right?

A I beg your pardon?

Q The curvature is away from the driver, correct?

A The dashboard is here. The curvature is down under so there's no sharp edges facing the driver.

Q Away from the driver and away from where you were examining the serial number?

A No, at right angles to me.

Q So the lip of this ledge that this bag was allegedly placed on was going away from the driver, correct?

A Yes, sir.

Q And you say that the bag was hanging down; is that your testimony?

A A portion of it was below the bottom of the dashboard.

Q Describe the manner in which it was hanging down.

A A portion was visible below the level of the dashboard.

Q What color was the bag?

A Brown.

Q Brown paper bag?

A Yes.

Q And the bag was split?

A Yes.

Q And from where you were standing you could see not only the bag hanging down, but you could see within that bag, correct?

A Yes.

Q You could see a glassine envelope in that bag and you could also see from where you stood with your search-

light directed at the serial number a white powdery (30) substance in the glassine envelope in the brown paper bag. You could see all this?

A Yes—are you asking me a question?

Q That's the question.

A The answer to the question is after I had seen the bag hanging down from the dashboard—the bag hanging down naturally caught my eye and I turned the flashlight on it and I looked at it. That is when I saw what it contained.

Q You could see through the bag?

A I could see what was in the bag.

Q Was the apperture of the bag facing you?

A The bag was ripped.

Q How much of the bag was exposed?

A I don't know, sir. You mean how much could I see?

Q Right.

A Of the paper bag could I see?

Q Right.

A Practically the whole thing.

Q The whole bag was hanging down?

A Practically the whole thing from the position where I was squatting looking at it.

Q Are you sure you didn't observe something and observe a bag and take it out and then look at it?

A I did observe something and take it out and look at it, yes, sir.

(31) Q You found the glassine bags after you took the bag down?

A I observed the glassine bag and then I took the bag down.

THE COURT: Do you have the bag here?

MR. SHARKEY: No, we don't Judge.

THE COURT: It may make very interesting testimony the way it's hanging under the dashboard and he could see it. Frankly, without the bag it may be hard for me to follow what you could see and it may be helpful to have it.

MR. SHARKEY: You have the testimony of the officer, Judge, as to what he saw. He could see enough of the bag that it was ripped—from his testimony that it was ripped and he could see the white glassine powder.

THE COURT: It's your case, and generally in suppression hearings we have this evidence. I don't want to speculate. We're not going to speculate if it's available.

BY MR. SILVER:

Q Officer, in your report didn't you state that during this time a brown paper bag was observed peeking out from under the dashboard which seemed to contain glassine bags containing white powder?

A That's what it contained.

(32) Q When you say "seemed," are you sure at the time that it contained glassine bags? Is that what your opinion was when you first observed the bag?

A That was what my opinion was, yes, sir.

Q You weren't sure that they were glassine bags?

A As sure as I could be from that distance.

Q You say the bag was ripped?

A Yes.

Q How wide was this tear?

A Not wide, narrow.

Q How much?

A I don't know, sir. Enough that I could see in it, that's all.

Q Well, if—

MR. SILVER: I wish I had something that looked like a glassine bag.

THE COURT: We may get it.

Q Was the broad side of the glassine bag visible through the tear in the bag?

THE COURT: Is this the normal half-inch glassine bag we're talking about?

THE WITNESS: No, we're talking about glassine bags like this, five of them.

Q How much of that glassine bag could you see?

A Enough of it to see what it was.

Q Officer, that really doesn't help me. Could you (33) be more precise? How much of the bag could you see? An inch, two inches, half an inch? What did you see?

A No more than an inch.

Q Was it a side view of the bag?

A I don't have any idea.

Q You don't know?

A I don't know.

Q Wouldn't the thin side of the glassine bag turned towards you look a lot different than the broad side? Wouldn't they be two entirely different views?

A It would be, but there's a bunch of them rolled up together and rolled up in a bag and put under there it would form such a compact unit as I couldn't really say whether I saw it from the end or the side or what.

Q Yes. But at best you saw a small section of a glassine bag?

A That's correct, yes, sir.

Q You didn't see the entire glassine bags?

A No, sir, I did not.

Q So it could have been any number of things that you saw in this brown paper bag?

A It was my opinion—

Q That was your opinion, but you had just recently seen in the trunk glassine bags.

A Yes, sir.

Q You were looking for glassine bags, were you not?

A I was looking for the serial numbers.

(34) Q You saw a brown paper bag, you testified?

A Right.

Q You were looking for narcotics, Officer, weren't you? I'm sorry, I didn't hear your answer.

A I didn't know you wanted an answer, sir. You mean when I saw the paper bag, was I looking for narcotics?

Q Sure.

A Yes, I was.

Q The glassine bags, that's what triggered off this search?

A I didn't search anything, sir, after the glassine bags.

Q You went underneath the dashboard?

A I squatted down to check the serial number.

Q You were going to check his car out thoroughly at that point, weren't you?

A It wasn't necessary.

Q Did you search the defendant's person between the time you examined the trunk and you started looking at the serial number?

A I might have patted him down.

Q Patted him down?

A That's right.

Q What did that produce?

A It didn't produce anything.

Q You didn't look at his arms; are you sure about that? Or you don't remember?

A I probably looked at his arms at one point somewhere along the line.

(35) Q Did you see on his arms what you might call track marks?

A I don't believe so, no.

MR. SILVER: I have nothing further, your Honor.

MR. SHARKEY: That's all we have, Judge.

MR. SILVER: Judge, prior to putting my defendant on the stand, would you hear me on a motion?

THE COURT: Under this procedure it is my understanding you can't get two shots at it. You have to go all the way.

But it may be of some interest, and I say this because this is just a little bit unusual, a box, this trickery, to see what we are talking about and a glassine bag 8 by 5, that perhaps unless this gentleman has a lot of experience in narcotics is just the type of thing associated with narcotics, or maybe you keep sandwiches in it. It may be of some interest to see this.

MR. SHARKEY: I'm sorry, your Honor.

THE COURT: I'm trying to say we hear testimony and I don't want to go into what trickery is involved to see what's in the trunk, but we're talking about a box and then we open a box and we see—and if I'm to gather from the (36) description of the hands, 6 by 8 inches, whether that's asociated with this—was that the same type of bag that was in the brown bag that he could see and what was in the brown bag. I assume it's all the same, it hasn't been changed any.

MR. SHARKEY: Judge, the only testimony we could have as to the amount of the bags that are visible would be testimony from the stand because certainly we can't go back to the scene.

THE COURT: But I would like to see what it looked like. If this was a potato bag, it would mean one thing. Frankly, it's a little bit unusual in this kind of a case and I've heard Vahe testify in a lot of cases.

MR. SHARKEY: It will be our contention when we get to argue the law in this case the nature of the bag isn't going to be instrumental as far as the State's argument is concerned. I'd like to reserve that until Mr. Silver is through with his witness.

THE COURT: The only problem is you made your mind up initially to something, whether or not the fruits of an unlawful search may affect the entire procedure. It just seems to me we're (37) in a type of area that the Court ought to have the benefit of what was observed.

Frankly, it's hard for me to follow the testimony—

MR. SHARKEY: Judge, it will be our contention that Patrolman Adcock had probable cause to search the car whether or not he saw the brown bag in the car.

THE COURT: That may well be.

MR. SHARKEY: Because that is our contention we don't think it is necessary to bring the bag in.

THE COURT: Probable what?

MR. SHARKEY: Probable cause to search the automobile before he found the brown bag.

THE COURT: Probable cause to search the automobile?

MR. SHARKEY: That is what we are going to say.

THE COURT: You had better do some reading during the night.

MR. SILVER: Judge, are you going to hear the entire motion?

THE COURT: I may take a five-minute break because I'm tired, but I would like it completed (38) as long as that is their position. They don't want to produce any of these bags. I'd probably like to hear you. Continue unless you rested.

MR. SILVER: It's not that. I was just wondering in view of the hour whether your Honor wanted to carry the motion until tomorrow.

THE COURT: I'd like to hear the testimony, if possible, because I'm sure you gentlemen are going to have to do some studying on the law and it may be of some if you can look up trickery, too.

MR. SILVER: Then it would carry over until tomorrow for legal argument?

THE COURT: I don't know. I'm going to sit here until it's completed.

(Discussion off the record.)

(Whereupon Court adjourned.)

CERTIFICATE

I, STEVEN J. LITHAUER, C.S.R., an Official Court Reporter of the State of New Jersey, do hereby certify the foregoing to be a true and accurate transcript of my stenographic notes in the above-entitled cause.

/s/ Steven J. Lithauer
STEVEN J. LITHAUER,
C.S.R.
Official Court Reporter

Dated: 7/18/72

Appendix C

Transcript Before the Bergen County Court Criminal Division

March 6, 7, 1972—Hackensack, New Jersey

Before: The Honorable Fred C. Galda, C.J.C. (t/a)

(3) THE COURT: This matter was orginally scheduled and heard on January 25th because it was a motion brought by Mr. Michael Silver to suppress certain evidence seized in connection with the matter of State of New Jersey v. Richard Hamilton on Indictment S-1469-71. The matter was continued until the 26th of January at which time the Court was made known of the fact that the defendant, Richard Hamilton, had been ill and was unable to appear. The matter was then carried.

Today, I was advised by the assignment judge that this matter has been sent out for trial with the understanding that the motion would be disposed of prior to trial.

Gentlemen, whatever is your desire we will follow. Do you want to start over or do you want to commence where you left off? I will do whatever defense counsel wishes to be done.

MR. SILVER: If your Honor please, at an earlier hearing the State had offered its witness, an Officer Adcock, who was fully examined by the prosecutor. I had cross-examined him. Your Honor had asked some questions and the State had rested. I feel in the interest of my client that it would be appropriate for us to proceed with the defendant's case, and I am (4) prepared to rely on whatever is in the transcript or as it exists in your Honor's notes and recollection of the testimony of the officer.

MR. SHARKEY: If your Honor please, it would be my understanding that at this juncture of the case Mr.

Silver would intend to put in whatever events occurred on this 30th day of August.

THE COURT: Prior to that he would have a right to cross-examine.

MR. SHARKEY: Apparently he had cross-examined Patrolman Adcock. I don't remember if he did or not. If your Honor Please; his testimony from the 25th, the January 25th hearing is fresh in my mind. However, the Court can rule on this motion. I have no objection to continuing where we left off the last time. In the interest of justice, I would request that we begin the motion over again and if the defendant intends to put a witness on the stand now on the basis of the fact that whatever testimony comes forth now will be much fresher in your Honor's mind than the testimony that was given two months ago.

THE COURT: It is the defendant's prerogative since the State had rested its case. It would seem to have been much better if someone had ordered the (5) transcript for the benefit of both of you gentlemen as well as the Court. But unfortunately the defendant should make a choice. He relies on the testimony that was had since it was a continued matter. Without his consent, I don't see how I can do it. That is the situation. Whatever you want to do, I will be obliged to follow. I have enough notes. You can always have a transcript.

MR. SILVER: I would prefer to proceed in the manner that I set out. I would prefer to proceed as I set forth in my statement. I would ask that Patrolman Adcock be kept in the courtroom in the event he has to be called in regard to any specific testimony. I object to his going into the entire procedure. Did your Honor receive the briefs?

THE COURT: Yes, I did.

MR. SHARKEY: I believe your Honor still has my copy of my memorandum.

(6) RICHARD THOMAS HAMILTON, III, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. SILVER:

Q Mr. Hamilton, do you recall the events of August 30, 1971?

A Yes, I do, sir.

Q Where were you at the time?

A I were—I was in the Esso station.

Q About what time of day was that?

A About 3:30, 4 o'clock in the morning.

Q Where were you coming from?

THE COURT: Speak loudly and clearly so I can hear you.

Q Where were you coming from?

A I was coming from the direction of the George Washington Bridge.

Q Where were you going to?

A I was going home.

Q Where is home?

A Philadelphia.

Q Had you stopped for gas?

A Yes, I had.

Q What did you do after you gassed up?

A After I gassed up, I paid the attendant, got in my car, put it in low gear, you know, in drive.

(7) Q All right. What was your rate of speed when you left the gas station?

A Well, I pulled into the highway and it was slow. I seen the patrol car at the other adjoining gas station.

Q When did you see the patrol car?

A I saw the patrol car when I was in the Esso gas station, prior to getting into my car.

Q I see. When you got on the street, what was your rate of speed?

A It was about, I say I have it in second gear.

Q What kind of car were you driving?

A 1966 LeManns.

Q How fast were you going?

A Not very fast because I seen the officer. I seen where he turned right around and followed me.

Q He followed you?

A Yes.

Q How long did he follow you?

A From the Esso gas station to the turn on Route 46.

Q How far is that, approximately?

A About a mile.

Q Then what happened?

A He pulled me over and asked me for my owner's card and registration.

Q Were you a licensed driver at that time?

A Yes, I was.

(8) Q Did you own that car?

A Yes, I did.

Q Did you have proof of ownership?

A Yes, I did.

Q Did you have proof that you were a licensed driver?

A Yes, I did.

Q What was the form of that proof?

A I had signed affidavits, notarized, you know, notarized copies, a certificate showning that, you know, I had reapplied for my license, because my car had been burglarized in Atlantic City..

Q When?

A Abut a week or so prior. Not quite a week prior, you know, to this. I had reapplied for my driver's registration card in Philadelphia. They gave me notarized copies, you know, to drive. That's good in the state, you know, for a period of 30 days. You know, by then I had my new registration and owner's card. I received my new owner's card while I was still incarcerated in Hackensack waiting to make bail. I have that now.

Q Do you have that in your possession?

A Right there on the table.

THE COURT: D-1. Mark it D-1 for Identification.

MR. SHARKEY: Your Honor, I will object.

THE COURT: He can mark it D-1. I don't know
(9) what it is.

(The card referred to was receiveded and marked Exhibit D-1 for Identification.)

BY MR. SILVER:

Q Take a look at that document, Mr. Hamilton. Are you familiar with it?

A Yes, sir.

Q What is it?

A This is the owner's card for the 1966 Pontiac Le Manns. . It was validated September 1st.

Q In whose name is that ownership?

A Richard I. Hamilton.

BY THE COURT:

Q What year?

A This year.

Q 1972?

A 1971.

MR. SHARKEY: Your Honor, at this time I will object to his testifying about this driver's license or owner's card, whatever it is. He said it was issued on September 1st. We are talking about events that occurred on August 3rd.

THE COURT: I sustain the objection.

MR. SILVER: Sir, I am simply trying to prove that the man showed proof of ownership.

MR. SHARKEY: This is—

THE COURT: He didn't show that.

MR. SILVER: No, sir. But it goes to prove that (10) he had the application in his possession when the officer stopped him.

THE COURT: It may be. This is subsequent to the incident.

BY MR. SILVER:

Q Did you ultimately get a new driver's dicense?

A Yes.

Q Do you have that in your possession?

A Yes, I do.

Q When was that issued?

A Same time, sir.

Q September 1, 1971?

A September 1, 1971. I am sure. You can check this.

MR. SHARKEY: Again, your Honor—

MR. SILVER: I am not going to offer it.

BY MR. SILVER:

Q Can you explain to the Judge exactly what you had in your possession when you were stopped—strike that.

Explain to the Court exactly what proof of ownership and proof that you were a licensed driver you had in your possession when you were stopped.

A I had a notarized copy from the Notary showing that I had reapplied for my license and owner's card. It was, you know, figuring it was stolen, it had something on the back. It says, "No penalties or tickets will be issued

(11) to the driver of this car for the extent of 30 days." I had a duplicate of that, you know. I most likely misplaced it.

Q Did you show this to the officer?

A Yes.

Q Had you been told that you could use this to drive?

A Yes, sir. It's legal to drive.

Q In what state?

A In any state.

Q You're licensed in Pennsylvania, correct?

A Right.

Q From whom did you receive the application?

A Abatt's, sir, 51 Chestnut Street.

Q Where?

A Philadelphia.

MR. SHARKEY: From whom?

A Abatt's.

Q Abatt's?

THE WITNESS: A-b-a-t-t's.

BY MR. SILVER:

Q Mr. Hamilton, did you have an expired registration and an expired license in your possession at that time?

A Yes, sir, I had.

Q Did you have those—do you have those on your possession now?

A No. The car was since stolen.

Q You don't have those?

A No, I don't.

(12) Q Did you show this to the officer?

A Yes. The officer saw those.

Q Did the expired registration indicate that you were the owner of the vehicle that you were then driving?

A Yes, sir.

Q A 1966—what was it?

A Le Manns.

Q Le Manns?

A Yes.

Q Did the driver's license also indicate that you were Richard T. Hamilton and were authorized to drive?

A Yes. sir.

Q You showed those to the officer?

A Yes, sir.

Q Did the officer say anything when he stopped you?

A I asked the officer then, I said, "What was wrong, officer?"

He said I was speeding. I said, "Speeding? Where?"

I said, "How could I be speeding when I saw you by the other gas station. I was filling up and then I pulled off on the highway. I saw you around by the other gas station."

I said, "I seen you when you pulled out of the gas station right behind me."

Q Was it then that you were asked to produce proof of ownership, and your license?

A Yes.

(13) Q After you showed him the documents, what did he do?

A Then he started to look around the car. At first, when I showed it to him, he asked for further proof. I took the key out of the ignition. I opened the glove compartment, you know. I showed him the key for the glove compartment and that's where the other proof was.

Q The other what?

A You know, that's where the driver's and owner's card were. He told me to get out. He took me to the trunk and asked me if the key fit the truck. I told him the keys fit all the locks. He asked me to open it to see if it could fit the lock. I put the key in and I opened it and shut it right back.

Q How much did you open it?

A About that much (indicating). Just by opening it and locking it to show that it fit the lock.

Q Indicating four or five inches?

A Right.

Q You closed it?

A Closed it.

Q Did you take the key out of the lock?

A Yes, I did.

Q What did he do or say?

A He told me to open the trunk, you know. I told him, "For what? The key fits the lock."

He asked me then what was in the trunk.

(14) Q Was the door of the trunk still closed when he asked you what was in there?

A Yes. I told him, you know, the jack and things like that. He told me to open it again. I told him, "For what?"

So he took the keys and he opened it.

Q He opened it?

A Yes. There was some boxes in the trunk and they were sealed. He asked me what they were.

Q How many boxes were in the trunk?

A Seven.

Q Were any of these boxes open?

A None of the boxes were open. All of them was sealed.

Q What do you mean by that?

A They had tape across the top, you know. That brown tape that you wet.

Q Masking tape?

A Yes, something like that.

Q Had any of the boxes been opened to the flaps?

A No.

Q They were all sealed?

A Right.

Q What did the officer do?

A The officer asked me what was in the box. I told him. I said, "It could be anything."

So he told me to open one and I refused to open it.

(15) Q What happened?

A He told me to open one. I refused to open it.

Q What happened?

A He told me to open it. I said, "Is that an order?"

And he said, "Yes, that's an order."

I told him, I says, "I can't open it. It belongs to my boss."

Q Did you open it?

A He told me he would take full responsibility for it, for opening the box. I told him I still wouldn't open it. So he took the box and broke the tape and pulled it open.

Q He opened the box?

A Yes.

Q Thereafter, what did the officer do?

A That's when he took, when he looked in there and he saw there was little bags. So he pulled me over to the side and made me roll up my sleeves. He searched me. He radioed for assistance and two more cars came. When they came, they came with great big flashlights and they told me to shut up; don't move.

Q Did you have anything in your possession out of the ordinary?

A No.

Q There was a number of police officers there at that time?

A Yes.

Q What did Officer Adcock do?

A I don't remember none of them by name.

(16) Q The officer that testified at our prior hearing?

A Well, yes. I couldn't identify all three of them. They just started searching the car.

Q All three of them?

A All three of them got into the car and started searching it.

Q Did you see Officer Adcock made an examination of the door to the driver's side?

A They weren't only looking at the door on the driver's side. They were inside of the car tearing at the door.

Q Was Adcock one of them?

A All of them were.

Q How long after you had been searched?

A They just waited for assistance for other cars to come.

Q About how long?

A That was about 5 or 10 minutes.

Q When those cars came, did they search it immediately?

A Yes.

Q Did Officer Adcock use a flashlight to examine the door?

A They had a flashlight about that long (indicating with his hands).

Q Did he use it to examine the door?

A No. They were inside the car. They didn't even look at no door.

Q Where were you standing?

A Right (17) there by the outside in the rear, you know, past the door. Not too far.

Q So you could observe Adcock's movements?

A Yes, sir.

Q Did you know where the serial number of your automobile is located?

A Yes, sir. On the Pontiac it was located in the center. It would be impossible to look at that. You would have to kneel down and look at that—unless you go all the way down.

Q Don't go ahead of yourself. I am talking about the inserted serial number at the front door.

A Yes, sir. It's about half way in between the door and door post and the floor. The floor is here, you know.

Q Half way between the top of the door?

A Yes.

Q And the bottom?

A Yes.

Q All right. Now, in relation to that serial number—strike that.

Now, in relation to the point at which the serial numbers were located, where is the dashboard?

A About eye level. About eye level.

Q Are you indicating it's at the same level as the serial number?

A Yes.

Q If you were looking directly at the serial number, could you see underneath the dashboard of your vehicle?

(18) A No, sir. It would be impossible.

Q How do you know this?

A How do I know this? Because I changed. You know, I took the tracer off it when I bought the car. In order to see underneath there you have to turn this upside down.

Q What do you mean by saying you have to turn this upside down?

A You have to bend down. If you kneel down, you have got to go down on the ground to look at it and the plate would be upside down. You might be able to see nothing but the bottom of the dashboard. But you couldn't see over the top of it. But you would have to bend down, naturally, to look at the serial number. In that thing you couldn't see anything underneath. Plus I had no interior lights, or anything, in that car. It's impossible to see in the middle of the night anything.

Q Richard, do you have a record?

A Yes, sir, I do.

Q A criminal record?

A Yes, sir, I do.

Q For what type of crimes?

A Possession of marijuana. I had done 5 to 10 years.

Q Anything else?

A Assault and batteries.

Q Criminal record. I am not talking about (19) disorderly person charges now.

A Yes. I done 2 years once.

Q For what?

A I done two years and then, you know, started 5 to 10. That was for interstate transportion. There was a car I borrowed on my job that was stolen.

Q All right. You were arrested and released. Was your car returned to you?

A Yes.

Q Were the applications that you made reference to returned to you?

A Yes, they were.

BY THE COURT:

Q You're talking about the affidavit? The papers, is that what you mean by applications?

A Yes.

THE COURT: And they were returned to this gentleman?

MR. SILVER: They were.

THE WITNESS: They were returned to me after.

Q They were returned to you after?

A They were returned to me after, right. Because I was taking the car back to Philadelphia.

MR. SILVER: May I approach the bench, your Honor?

THE COURT: Yes, you may.

(A discussion is had at side bar.)

(20) THE COURT: At this point we will have the prior testimony of Officer Adcock read to us for the benefit of the Court and counsel.

MR. SHARKEY: Okay, Judge. This will be before I cross-examine this witness.

THE COURT: I see. Mr. Hamilton, you can sit down wherever you want to.

MR. SHARKEY: You want me to cross-examine before?

THE COURT: No. Go get the reporter who reported the last hearing. He is with Judge O'Dea today.

Proceed, Mr. Reporter.

(The official court reporter, Steven Lithauer, who reported the prior proceeding, read the testimony of Officer Adcock to the Court and counsel.)

THE COURT: Thank you. We will take a five minute break.

(A brief recess is taken.)

THE COURT: Is there an objection to have this suppression hearing in front of this group of Hackensack students?

MR. SILVER: Yes, your Honor. The defendant has stated he would prefer to have the matter heard out of their presence.

MR. SHARKEY: It is the State's feeling that the (21) students be allowed to hear this trial. I feel that in the best interests of society these students be allowed to see how the wheels of justice turn. If your Honor feels it is prejudicial to the defendant we would not oppose excluding them. However, we feel they should be allowed to stay.

THE COURT: I will deny your request.

MR. SHARKEY: Your Honor, I believe at this stage we finished with the reading of the transcript.

THE COURT: Mr. Hamilton, will you return to the stand for cross-examination.

(The witness, Mr. Hamilton, resumed the stand.)

MR. SILVER: I have not completed my examination of the witness.

THE COURT: You can take as long as you wish.

BY MR. SILVER:

Q Mr. Hamilton, as a result of your being stopped and subsequently arrested, were you ever arrested and convicted for speeding?

A No, sir, I wasn't.

Q Were you issued a traffic summons of any nature?

A No, sir, I wasn't.

Q Now, I am going to go back to these documents that you showed the officer when you were stopped. According to the transcript that has been read, and you listened to it today, the officer testified that they were (22) things that you stated were from the City of Atlantic City. Do you recall that?

MR. SHARKEY: Your Honor, if the Court please, the defendant did not testify to that. He said it was in Atlantic City but they did not show that they were from the city.

THE COURT: The objection is well founded.

MR. SILVER: I will withdraw the question.

THE COURT: Thank you.

BY MR. SILVER:

Q Now, did these papers in fact state, at the time it was typed, Atlantic City?

A Yes.

Q What did they state?

A Abatt's, you know, notary.

Q Please speak clearly and raise your voice.

A It was a paper in Pennsylvania. When you lose your license, you know, you go, instead of going to Harrisburg, you go to one of these four-hour services. You report your license and stuff stolen. You know what I mean? They give you a statement when you reapply for your license and owner's card. So, you know, they will give you some notarized copy of paper that you have applied for your owner's card or driver's license and showing that you are not subject to any fine and why you are not, within a period of 30 days. It is notarized. This is what I (23) showed him. I told him probably that my car was burglarized in Atlantic City. I reported it to the Atlantic City Police Department. I was on record there that my car was burglarized and that my identification was stolen.

Q Did you receive any documents from the Atlantic City Police Department as a result of this report?

A No, I haven't.

Q When was your car burglarized?

A My car was burglarized about four, four or five days prior to getting back those documents.

Q You use the word Abat!?

A Yes.

Q Spell it.

A A-b-a-t-.

Q A-b-a-t?

A Right.

Q What else did it show?

A That's the name and it had his address.

Q Whose address?

A Abatt's.

BY THE COURT:

Q Go ahead. What else did it show?

A It has service rendered, you know, on one side. Service rendered, you know, what I have done.

BY MR. SILVER:

Q Mr. Hamilton, we don't know. You're testifying. I have to get information from you. It has your name Richard Hamilton.

A You know, after that (24) Richard Hamilton, the address. And then it has services rendered. You know, if you want something notarized or you want something serviced. They notarize it and it is stamped that you applied for a driver's license and owner's card. They have a stamp with Pennsylvania, a code number and everything. I don't know how it is written for that particular article, for a Pennsylvania vehicle and the code.

Q With reference to that document that had to do with your lost registration, did it have a registration number on it?

A Yes, it did.

Q Did it have a serial number on it, to your knowledge?

A Yes, it does.

Q And the document with regard to your lost driver's license did that have, "Lost Driver's License" on it?

A The only thing it had on the driver's license, it says, "Operator's License," you know, my name, you know, and address, you know, and with the same stipulation.

Q Did both of these documents have your name on it?

A Both of these documents had my name on it.

Q The address?

A The address.

Q All right. Now, with regard to the expired license and registration that was in your glove compartment, (25) did they both have your name and address on them?

A Yes.

Q The same address?

A Yes.

Q So all four documents had the same address, right?

A Same name and address, right.

Q Did the expired registration have to do with the car you were driving when you were stopped? Was that the expired registration to the Le Manns?

A Yes, the Le Manns.

Q Was that the expired registration to the car that you were driving then?

A Yes, sir. Because—excuse me. Pennsylvania has issued new license tags in 1971. You know, the year 1970—this is 1972. In 1971 they issued new tags. These tags are good from 1971 to 1976.

Q When did you get the new tags?

A The new tags went into effect the 31st of March.

Q 1971?

A Yes.

Q So that expired registration referred to that card?

A Yes, on my old tags.

Q I see. Now, these two documents, I am referring to the temporary papers that permitted you to operate this vehicle, they were returned to you after you were released, is that correct?

A They was returned to me after.

(26) Q After?

A Yes.

Q Did he give them over to you?

A Yes, he did.

Q Now, do you have those with you?

A No, I don't.

Q Why not?

A Because my car was stolen.

Q When?

A Approximately two weeks after that.

Q Approximately two weeks after that?

A It was stolen and then it was stripped.

Q Stripped or stolen?

A It was stripped.

Q It was?

A It was stolen. I found it over here. It was in New York.

Q Well, why was it in New York?

A Because I couldn't drive it back when I got it from the lot.

Q What lot?

A Off the police lot.

Q Why not?

A Well, broken shocks for one. I just didn't think I was going to make it back. The transmission wasn't too bad. I took it up to New York, up to my brother and, you know, they stole the car and they stripped it. It didn't have any tires, no radiator, and the motor, it was stripped, also the seats, and the (27) windshield was smashed and the hood and the roof, that was caved in.

Q This was about a week after you were released from jail, right?

A Right.

Q Now, you and I discussed these missing applications, did we not?

A Yes.

Q Did I ask you for them?

A Yes.

Q You weren't able to produce them?

A No, sir.

Q Did I tell you to get a photostatic copy?

A Yes, you did.

Q Did you?

A Yes, sir.

Q Did you turn it over?

A Yes.

MR. SILVER: Nothing further, your Honor.

CROSS-EXAMINATION BY MR. SHARKEY:

Q Mr. Hamilton, referring back now to August 30 of last year.

MR. SILVER: May I make an interruption, Prosecutor? However, if your Honor please, it is my intention to make application to the Court for an opportunity to examine my files.

THE COURT: I will give you that opportunity to find them due to the fact that we have some reference to the slips of papers that we have had some discussion on.

(28) MR. SILVER: Yes, sir.

Q Referring back to these two pieces of paper, Mr. Hamilton. Do you see the top of this page. There is your name and address, and this box is checked. On the front it has services rendered.

A Yes.

Q Will you please, Mr. Hamilton, get up and go to the board and draw on there what is on the front and back of those slips of paper as you remember them, and please be as specific as possible. What do those blanks read?

A (The witness goes to the board.) Services rendered. You know, like, that they could apply. I don't know, you know.

Q Who is Abatt?

A Just a Notary Public. He's a Notary.

MR. SILVER: Let him answer the question.

Q Okay. Which one of those blocks was checked on the piece of paper you gave to Patrolman Adcock?

A Operator License. You know, then on the back, on the back it has code numbers, vehicle code numbers. You know, what the registration was. It says what you applied for.

Q What were you applying for? What was it that you were applying for?

A On one of them I was applying for an operator's license and on the other one I was applying for an owner's card.

Q Okay. What else is on the back of the card then?

(29) A It had a number, you know, like I said. A vehicle code number and giving permission, you know, which is for drivers, and it said 30 days and there would be penalties rendered, you know, for a period of 30 days, under the statute. It gives the number of the statute and then it is notarized and signed.

Q Where is it notarized?

A It's notarized right here.

Q Where is it signed?

A It's signed right here.

Q By whom?

A By whomever notarized it.

Q Who was that in this case?

A I don't remember the particular name that notarized it.

Q You went to Abatt's to get these papers. When did you go to Abatt's to get these papers? You can sit down.

A After my car was burglarized and my license and stuff was stolen. As soon as I got back over to Atlantic City, I went directly over to apply for a new operator's license and owner's card.

Q As soon as you got back over to Atlantic City?

A Yes.

Q Did you show the papers to Patrolman Adcock from Atlantic City?

A No.

Q Did you show him the papers in this format?

A Yes. I told him briefly that my car was burglarized (30) in Atlantic City, etcetera, etcetera, etcetera.

Q Now, when you pulled into this station for gas, as you say, you say you saw the patrol car in the other gas station?

A Yes.

Q What was the patrol car like?

A What was the patrol car like?

Q What color was it?

A I don't know what the color was exactly. I couldn't state.

Q Did it say "Bergen County Police" on the side? What sort of marks did it have on it?

A I saw it right there. I saw it and on the top it has a light that goes around.

Q It has a light on the top of the vehicle?

A It goes around. You know how you can spot cops and things like this. As far as looking at the side of the car, or what color, or things like that, I don't know.

Q I am asking you specifically about marks. Did it say police on the back? Did it state the words, "Bergen County Police" with the lights on top of the car?

A Yes.

Q Did it have a dome light on it?

A I don't know exactly. It might have been a dome light. I don't know.

Q Were there any marks on it? Did it say, "Police Car?" Did it say "Bergen County Police?"

(31) MR. SILVER: Judge, I don't see—

THE COURT: Just one question at a time.

A He was in a police car. I noticed that.

Q Okay. How did you know it was a police car?

A I saw it.

Q You say you saw cars around and in the gas station. I want to know what marks you saw on that car.

A In different counties, different states, you have different marks and different colors of police cars.

Q I am aware of that.

A (Continuing) They have different things on cars. As far as colors go, they all have different colors.

Q I am asking you about what happened on this particular night regarding this car that you say you saw in a gas station on Route 46.

MR. SILVER: He told him, your Honor.

A I couldn't state definitely what it said on the side of no vehicle. I just saw a police car cruising in the gas station, adjacent to the one I was in and I saw the officer sitting behind the wheel.

Q Did you know when you opened the glove compartment there was an expired driver's permit, an expired registration, in the glove compartment?

A No, not particularly. I couldn't state that.

Q You didn't know?

A No. I couldn't (32) state that I did exactly know. But right now, it was slips where I had broke down on the highway, you know, and I wanted to show him something else with my name on it. I know there was a reported slip in there to show where I had broke down in Atlantic City.

Q You didn't know there was an expired previous permit and an expired registration in the glove compartment?

A No. Because we generally carried them. I can't actually say that.

Q Were you surprised though when you saw those things in the glove compartment? Were you surprised to see them there?

A No. I was glad.

Q You were glad?

A Yes. It was additional proof of my ownership of the car.

Q Mr. Hamilton, did you have any identification whatsoever on you at the time Patrolman Adcock stopped you?

A No.

Q Do you remember when you were arrested on this evening, Mr. Hamilton?

A The only thing I know is that I saw the police car and I was cold.

Q Were you arrested before Patrolman Adcock and you looked in the trunk or were you arrested after that?

MR. SILVER: If your Honor please, I object.

THE COURT: I sustain the objection.

Q When were you arrested in relation to the events (33) that you and Patrolman Adcock have testified to occur?

MR. SILVER: I object.

THE COURT: I sustain the objection.

MR. SHARKEY: On what grounds, your Honor?

THE COURT: It is a legal conclusion.

BY MR. SHARKEY:

Q Were you arrested on that evening, Mr. Hamilton?

A Yes, I was.

MR. SILVER: Objection.

THE COURT: The answer is yes he was.

MR. SILVER: I don't think he understands. It calls for a legal conclusion.

MR. SHARKEY: I just asked when he was taken into custody, your Honor.

THE COURT: I will permit him to say he was arrested. The answer was he didn't say when. He said he was arrested. The fact that the officer put somebody under arrest is one thing. He may be arrested without being told that he is arrested.

MR. SHARKEY: That's all I have, your Honor.

MR. SILVER: Nothing further.

THE COURT: Step down.

MR. SHARKEY: If your Honor please, at this time I would like to recall Patrolman Adcock as a rebuttal witness.

(34) MR. SILVER: If your Honor please, I would object to Patrolman Adcock testifying any further. It is very clear what his testimony was and it was read into the record. The State has rested its case. I don't see any further necessity for Patrolman Adcock testifying in this matter. The entire record has been read before your Honor and it should be submitted for decision. Besides, I haven't rested.

MR. SHARKEY: I would like to call a rebuttal witness at this time.

THE COURT: Number One, you would not be entitled to call a rebuttal witness until the defense has rested its case. That would be Number One.

MR. SHARKEY: I want to rebutt this witness's testimony, your Honor.

THE COURT: You are not permitted to do that until the defense has rested. That is Number One. I will not be confronted with your argument until the defense rests.

MR. SILVER: I have another witness, your Honor.

THE COURT: We will have to let the record show that the students group went out inasmuch as there was some objection by the defendant.

(35) RICHARD HAMILTON, SR., called as a witness on behalf of the defendant, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. SILVER:

Q Mr. Hamilton, you are the defendant's father, correct?

A Right.

Q Do you live with your son?

A I do.

Q All right. Are you familiar with this Le Manns automobile that we have been talking about?

A Yes.

Q When were you notified of your son's arrest?

A It was on, I think it was the same date that they stated here. It was the early morning of that day.

Q And the date of his arrest?

A The date of his arrest, yes.

Q What did you do when you were notified?

A I came to Hackensack.

Q I see. With whom did you speak?

A I first—his wife and I went to the sheriff here in order to get permission to see him. I got permission to talk to my son.

Q When was he released?

A I think it was a couple of days later, or the next day. I went up specifically to get him out. I was a little upset (36) about the procedure. I was quite busy trying to get his release.

Q You posted bail for him?

A Yes, I did.

Q When he was released, were any of his personal effects turned over to you?

A It was.

Q What?

A Temporary registration for the 1966 Le Manns.

Q Was there anything else?

A That was all I wanted.

Q Was there a temporary driver's license?

A No. All I got, Mr. Lang of the Public Defender's Office, got the temporary registration because this is all I needed to get possession of the car.

Q Now, do you recall what this temporary registration looked like?

A Yes. It was a square—not quite a square. It was about three inches wide and about five inches long, or four inches long. You know, just small dimensions.

Q What was the color of it?

A White.

Q Do you recall what it said?

A Yes, "Temporary".

Q What did it say?

A "Registration from Abatt's Automobile Service".

Q Did it say anything else on it, to your (37) recollection?

A No, that was all of it. I would have to see the correct document to possess that car, which I had to have to get the car.

THE COURT: All right.

Q Did it have your son's name on it?

A Yes, it did.

Q Did it have—strike that.

Did it have the license number of the Le Manns on it?

A It did.

Q Did it have, to your recollection, the serial number of the Le Manns on it?

A I couldn't state that, no. The only thing I was looking for, I saw the name of the car and the back on it.

Q What did Abatt's do, if you know?

A Automobile Service, the place that signs your license and registration and other parties work there.

Q Where is it located?

A 51 First and Chestnut Streets.

Q Was this instrument that you received notarized?

A Yes, it was.

Q When you say notarized, what do you mean?

A It's a Notary and it was stamped and a seal of approval was on the left-hand corner. I saw his name on the right side and I do believe the name was down. The stamp was over the top of the name.

(38) Q Did you see it on the left-hand side?

A Yes.

Q And what was on the left-hand side?

A The stamp over the name. The stamp was kind of over the name.

Q Whose name?

A The Notary Public's name.

Q This instrument was not signed by your son, was it?

A Oh, no. Definitely not.

Q Did you get the vehicle?

A Yes, I did. I went to get the vehicle.

Q Where was it?

A It was, it was in a place away up the road.

Q In Jersey?

A Yes, New Jersey. It was where the police had towed it to.

Q What was the condition of that vehicle when you picked it up?

A The shocks on the left side was completely gone.

Q The shocks?

A The shocks.

Q How about the car itself?

A I didn't even try to drive that after that. I didn't even take it out of the parking lot.

Q What happened?

A It just wouldn't run. It wouldn't keep running. So I put it back into the parking lot and paid another day of $5.00 for it.

(39) Q How many days after your son's arrest was this?

A I think that was the next day or the day after. I think he was arrested one or two days because I had to pay $50 or $55 for towing and $5.00 a day. I think it must have been two or three days.

Q Did you come back the following day and pick up the vehicle?

A Yes, I did.

Q Did you drive it out of there?

A No. I come and got my son. He was out on bail. That's when we went down there together. I got it started. He couldn't make it to Philadelphia. So I said, "Take it on to New York and leave it at your brother's."

Q You were there when he took it?

A Yes, I was. Because I had my car.

Q Were you driving behind him or what?

A I had my car and I was behind him to New York. He was halfway toward the Bridge and then I went to Philadelphia and he went to New York.

Q You didn't follow him into New York?

A No.

Q Did you see the car subsequent to this time? Did you ever see it after that?

A I didn't.

MR. SILVER: Nothing further, your Honor.

MR. SHARKEY: No questions.

THE COURT: All right, Mr. Hamilton. You may (40) step down, sir.

MR. SILVER: Nothing further, we rest.

THE COURT: The defense rests. What is your position, Mr. Sharkey?

MR. SHARKEY: Your Honor, I would like to call Patrolman Adcock again as a rebuttal witness insofar as testing the credibility of Hamilton and also to establish certain other information about this new evidence with respect to this notarized seal here.

MR. SILVER: If your Honor please, I object. Counsel refers to the diagram as new evidence. It is not new evidence.

THE COURT: I take it, gentlemen, he means the testimony with reference to the diagram. It has not been marked in evidence.

MR. SHARKEY: That's right, your Honor.

THE COURT: Go ahead. Let me hear you.

MR. SILVER: It is not new testimony, if your Honor please. When the defendant first took the stand, I asked him what documents he offered as proof of ownership to the police officer. He made reference to a slip from Abatt's. Officer Adcock referred to that matter. I say it should be submitted to the Court for determination. There is no conflict in the testimony. Officer Adcock was on the stand and (41) he should not be given the opportunity to reinforce the testimony that has been offered. His testimony was to the contrary. It is not new evidence. The only evidence we have had presented was by the defendant and that has been consistent throughout. He testified that he produced this evidence that he had secured in Atlantic City. He told the officer that he had this driver's registration and he told him he reported it to the police department. He went to Abatt's which is the same, sir, as a motor vehicle agency in Pennsylvania. I say there is no new testimony. The prosecutor is not surprised. He has rested his case. Both sides are bound by the testimony offered in the case and submitted to your Honor for your Honor's determination.

With this exception, sir, I would like a little time to search my files for this mysterious document.

THE COURT: The prosecution now states it would like to call as a rebuttal witness Patrolman Adcock, who

had previously testified. The defense strenuously objects to the same and raises its objection on what might be, what the prosecution referred to, as some diagram that has been offered by way of testimony but not marked in evidence.

As I recall the law today, ordinarily, I suppose, (42) rebuttal is confined to the contradiction of a specific subject introduced on direct or cross examination of the defense witness. I believe it is Stevenson v. La Rocca where that is referred to. Likewise, I believe the cases seem to indicate that the Court is vested with particular discretion, particularly where it is designed to contradict a specific subject introduced. It is always the Court's obligation to sift as fully as possible the exposition of the true facts. I don't know what the question is going to be. I can't anticipate it. The prosecutor is aware of the purposes of rebuttal, to contradict a specific subject already presented to the Court. Since I don't know the question. It seems to me it can be premature based on the general proposition of law. Because factually there seems to be considerable questions still open. I might say the Court on its own has directed the officer to see whether it can be ascertained when these instruments were turned over to the sheriff and from whom and to determine whether such documents are in existence.

The Court suggests that someone ought to check with Mr. Lang, and we can wait for about ten minutes. I suggest that we ought to examine whether the files contain these instruments and they should be brought (43) before the Court.

Be that as it may, I for the moment, will overrule the objection and permit you to call a rebuttal witness, if that is your desire, to contradict any specific subjects introduced on direct or cross-examination.

Since it is within the Court's discretion, I will exercise my discretion. We will go until another five or ten minutes.

ALBERT ADCOCK, previously sworn, called in rebuttal on behalf of the State, testified as follows:

DIRECT EXAMINATION BY MR. SHARKEY:

Q Officer Adcock, first, with respect to the automobile you were driving that night on the 30th of August, will you describe it, please, to the Court?

A It was car number 842 and it is a 1969 Ford Sedan, two-tone, color blue, unmarked, no lights; no dome light on it.

Q Thank you. With respect to those two pieces of paper which the defendant gave you when you asked for (44) proof of ownership of the automobile, were those two papers like the papers here the defendant testified to?

A Nothing at all like that.

Q They were unlike that?

A The two pieces I had had writing only on one side. To begin with, they were white and oblong and I checked the form and there were two identical papers; both of the same pieces of paper had along the top "Atlantic City."

Q Will you describe the papers as you remember it?

A Perhaps it might have been a little longer than that and printed across the top was "Atlantic City," and over that I believe there was a name printed on the form.

Q Printed in what manner?

A It was printed.

Q It was printed?

A Yes. The rest of it was handwritten. It was on lines like this. It was handwritten out on these lines.

Q Was there anything else on those pieces of paper?

A Nothing that I can recall. There was a signature down here on the corner.

Q What did it say on these lines which was handwritten in?

A When it was given to me it was supposed to represent the driver's license, his name plus the address was on it.

(45) MR. SILVER: Oh, I'm sorry. I did not hear that.

A (Continuing) The name and address were on it.

MR. SILVER: Were?

THE WITNESS: Yes.

BY MR. SHARKEY:

Q What else did it say? Did it have just the name and address on it?

A It was the name and address. I could tell you what it didn't have.

THE COURT: No, no. The objection is sustained.

Q It had the name and address?

A It had the name and adress, yes, sir.

Q Okay. The one with respect to the registration.

A The registration was a similar piece of paper; blank on one side, writing on only one side, right and it had a basic description of the car, you know, a 1966 Pontiac and I believe it had a registration number on there.

Q There's a registration number and a license plate number?

A A registration number and a license plate number, yes, sir.

Q Now, at any time did Richard Hamilton give you any other papers besides, other than those two you described?

A No, sir, he did not.

Q Were those two pieces of paper have a seal or notarized?

A I don't know, sir.

Q You don't know?

A No.

(46) Q What did you do with those two pieces of paper?

A I believe they were inside his personal property. I presume they were returned to him.

Q As a Bergen County police officer for over six and a half years, Patrolman Adcock, have you been involved in investigations where licenses and registrations have been reported as stolen?

A Yes.

Q Was there any code on those papers to indicate that the registration was stolen?

MR. SILVER: I object.

THE COURT: The question should be whether or not he checked with N I C, or whatever they do in Pennsylvania. You can't qualify him as to what is done in the State of Pennsylvania.

MR. SHARKEY: I am talking about New Jersey.

THE COURT: This is a Pennsylvania license. He said that.

MR. SHARKEY: Okay, your Honor. That is all I have.

CROSS-EXAMINATION BY MR. SILVER:

Q He assured you, Officer, this wasn't a stolen car, correct?

A That's right.

Q It was registered in Richard Hamilton's name, correct?

A I don't know.

(47) A I don't know that either.

Q Did they ever return the car to him?

O I don't know, sir.

Q You don't know?

A No, sir.

Q These two documents that we are talking about were then returned to him?

A Yes, sir. They were put into his personal envelope with all his personal property.

MR. SILVER: Nothing further.

THE COURT: Step down.

We will recess for lunch. I trust you gentlemen will explore all the avenues possible regarding this document.

We will continue after lunch, after 1:30.

Q Richard Hamilton is a licensed driver?

(Court adjourns for lunch.)

(Court adjourns for lunch.)

(48) AFTERNOON SESSION

THE COURT: Have we made any progress?

MR. SILVER: Yes. I found the instrument that I had in my possession. It was in my file.

THE COURT: What did you find out about it? Did you do any work?

MR. SHARKEY: I did a lot of work, your Honor.

THE COURT: The next time I would suggest that you check the jail.

MR. SILVER: What does your Honor want?

THE COURT: I am just curious.

MR. SHARKEY: The police checked their records to see if they had any paperwork on this.

THE COURT: It is common practice when a man is admitted at the sheriff's office to give him an envelope to put his possessions in.

MR. SHARKEY: I object to this. The date on this is December 15, 1971. We are talking about events that occurred on August 30th of 1971.

THE COURT: What is the story?

MR. SHARKEY: You knew we marked this.

MR. SILVER: This wasn't the instrument that he showed to the officer when he was arrested. As the defendant testified, sometime after his arrest the two instruments that we have been discussing in court (49) were stolen from his vehicle. When he came to my office, I told him to try and get a photostatic copy, or some dupli-

cation, of those instruments that you contend you showed the officer at the time of your arrest.

Now, I take it that on December 15th he went to the Abatt's Agency and made further application. According to him, he was unable to obtain a photostatic copy of the instruments that he showed the officer. This is a duplication, a different date, admittedly, of what he had in his possession when he was stopped.

Now, Judge, I attempted to get into evidence his current driver's license and registration card and I am going to make a further effort to have the defendant testify to that and move to have those certain items into evidence to show that on December 1st his license and registration were validated as a result of the application that he had made to the Pennsylvania authorities prior to September 1st and that it was sometime during the month of August. The man's license was validated September 1st while he was in jail. He couldn't possibly have gotten a new license and new registration if this had not been done previously. It makes no sense to say that (50) this man made application to the authorities in Atlantic City. New Jersey can't issue a duplicate license for a Pennsylvania driver.

THE COURT: I just want to suggest that the date on this certificate is 12-15-71, which again causes the Court some concern. But only in the interest of justice, because of the great amount of discussion pertaining to the two items that were not presented before the Court may have considerable bearing on this case, notwithstanding there was no obligation of the Court. Because in the Court's experience, if some of this evidence may be available I would suspect it would be in the prosecutor's office.

On its own, the Court went through some 150 receipts that are entitled "Bergen County Jail Prisoner Property

Records" that are as a matter of record kept on every prisoner that is turned over. I am a little disturbed that the Court on its own had to find this information, particularly when there is, as I said, great variance in the testimony on something that should be public record.

Defense counsel now presented to the Court a paper which was marked D-2 for Identification, which purports to be from Abatt's Auto Body Service and it is a notarized instrument and bears the (51) name Richard Hamilton, suggesting a duplicate license application. The prosecutor suggests, because there is a long interval, that at the time of this incident that occurred on August 30th, but because of the great variance in the testimony here today, it is unconscienable that it should be left unanswered and for the Court to have to go through a hundred receipts to arrive at the truth. There were the pieces of paper of August or September in 1971. So when we look at those items here, that the prosecutor objects to, dated 12-15-71, you might recall the testimony that even Patrolman Adcock indicates there were two slips of paper, one for registration and one for a driver's application and he claims it was Atlantic City instead of Abatt's. When I saw this duplicate application, it refers to writing on the back, which was the testimony of the defendant. There was writing on both sides. The officer says there was only writing on one side.

MR. SHARKEY: If you Honor please, what we are concerned with here is the probable cause—

THE COURT: I have not finished my point. The problem that is going—

MR. SHARKEY: I am talking about this piece of (52) paper, Judge.

THE COURT: The gentleman tried to suggest to the Court and explain why this was December 15th. I want to call attention to the fact that on the duplicate, on the back of this it says "D-O-B-4-4-38" and the serial number.

MR. SHARKEY: That is the date of birth.

THE COURT: Date of birth "4-4-38."

MR. SHARKEY: Your Honor, the issue is whether this man had a valid driver's license for the automobile.

THE COURT: If you look at the property clerk's information, there were two slips of paper with the license on it. I can concede that that is not in their files. Because I went over and examined 150 sheets.

MR. SHARKEY. We have the testimony from the arresting officer, who drew a picture of the slips of paper, and he said none of them was official. He said that they both had printed on them "Atlantic City." That was under oath. Patrolman Adcock testified that in no way were they official documents to him. It was on the basis of that that he asked Mr. Hamilton if he had any other indicia of ownership, or anything to show that he was (53) Richard Hamilton and he had no identification on him whatsoever.

THE COURT: We have the serial number 37176 or B164132, the personal papers of the defendant.

MR. SHARKEY: Because he gave those two slips of paper to Patrolman Adcock who has testified to that.

THE COURT: From Atlantic City.

MR. SHARKEY: Yes. He gave these two pieces of paper and said they were the registration number and he said he reported that his license and registration were stolen. Patrolman Adcock testified he was the one who took this paper.

THE COURT: He doesn't know whose name is on it. He just testified that he saw that the paper stated "Atlantic City."

MR. SHARKEY: The officer stated the paper wasn't official to him. He said the paper was not an official document of the Motor Vehicle Department and on that basis he said: Well, the guy does not have proof of license. That's the paper that Patrolman Adcock saw.

THE COURT: How would he know. He was never shown this. He wasn't shown this piece of paper on the stand before. Patrolman Adcock said he never saw that. It would have to be taken away from the (54) defendant. You can see that. Why does this refer to the serial number?

MR. SHARKEY: It is possible he had a serial number written on the piece of paper.

THE COURT: The burden is on you.

MR. SHARKEY: I had direct testimony as to what was on that piece of paper.

MR. SILVER: If your Honor please—

THE COURT: What we are doing is arguing about the admissibility of these slips.

MR. SILVER: If your Honor please, to support my offer of proof of the application, I am prepared to offer into evidence the validated license and validated registration effective as of September 1st, 1971, which referred back to the operator's license in the name of Richard Hamilton and the Pontiac sedan in the name of Richard Hamilton. The man must have made application for a renewed license and registration if this became effective September 1st, a day after he was arrested and received it while he was in jail. I am prepared to put him on the stand and so testify

as to the instruments I am holding in my hand. Atlantic City cannot renew a Pennsylvania license or a registration number.

MR. SHARKEY: We are not disputing that he had (55) a validated license and registration on September 1st. We are not disputing that at all. What we are concerned with is what he had in his possession when the car was stopped on August 30th. He testified he produced a slip of paper which was dated December 15th. Patrolman Adcock testified to that.

THE COURT: It all sounds incredible.

MR. SHARKEY: Patrolman Adcock testified he had slips of paper, one that reported the license stolen and one reported his registration stolen. That's what Patrolman Adcock testified to.

THE COURT: That is not the issue.

MR. SHARKEY: Patrolman Adcock testified as to what he showed him.

THE COURT: The only issue is on the admissibility of these instruments. Just a minute. I want to get a number.

MR. SILVER: I'm sorry.

THE COURT: I want the record to reflect that in the property clerk's file there is reference to a serial number 37176B1641312. What is the serial number or license on the valid instrument?

MR. SILVER: Are you talking about the registration number?

THE COURT: Either one. Either the driver's (56) license or the serial number on the automobile.

MR. SILVER: The driver's license that is validated September 1, 1971 expires April 30, 1972, operator number 16464297, and the registration number validated September 1, 1971 which expires March 31, 1972 has registration number 781026 and serial number 237176B104131.

THE COURT: That doesn't help the Court. It is obvious there were some papers pertaining to the serial number and license number handed back—two papers.

I fail to see how I can admit D-2 because it is dated 12-15.

I must sustain the objection.

MR. SILVER: I am offering into evidence as well the registration number and the driver's license in an effort to prove that the man had made an application for a validated license. That license started on September 1st. They are validated as of September 1st. The prosecutor said he had a validated license. He doesn't challenge that. The defendant indicated he had lost his license. He didn't get a license in this state from September to the next year. You don't get a registration from September to March of the following year. The man (57) testified that his license and registration were stolen. He made efforts to secure new ones. This would give proof to the fact that he did make application. The man had the same pieces of paper, the same documents that he handed the officer. The defendant testified that he went back to Abatt's to get Pennsylvania plates and to get a Pennsylvania driver's license. It just can't be in Atlantic City. There is no way possible to do that. All I am offering is this D-2 in Evidence and it is to establish that at the time he was arrested he had in his possession a similar document. I can't say that that is the same. It is not. He lost it. I appreciate the Court's dilemma. It is a duplicate and it is confusing. If your Honor please, all I am trying to do is to show that these were the

various documents that he had in his possession, the two items that he testified about. That is all I have and I am offering it.

THE COURT: You don't have those two items?

MR. SILVER: I don't have them.

MR. SHARKEY: Your Honor, again, I object to the admission of these two documents. Whether or not this defendant made application to Pennsylvania authorities to get a new driver's license subsequent (58) to the events in this matter is irrelevant. The relevant question is: What did he present to the patrolman when he was apprehended? What was in his possession?

THE COURT: I considered that.

MR. SHARKEY: The defendant said this morning he presented two papers with Abatt's written on them.

THE COURT: Yes.

MR. SHARKEY: When he presents them into court, they bear the date December 15. Officer Adcock testified he had no such papers on his possession. He had no identification on himself whatsoever.

THE COURT: He also said, to the best of his recollection, he presented a piece of paper, two identical pieces of paper and he doesn't remember who signed it, or anything else.

MR. SHARKEY: He said the license number is on one of them.

THE COURT: This is incredible.

MR. SHARKEY: The policeman states that he asked the man for his license and proof of registration.

THE COURT: Yes. He handed him the slips of paper.

MR. SHARKEY: Yes. He said he handed him these slips of paper. Patrolman Adcock said he handed him (59) these slips of paper.

THE COURT: And it was Patrolman Adcock who said he does not know who signed it.

MR. SHARKEY: He said these papers are not official. He said he saw this paper, or these papers that said "Atlantic City."

THE COURT: Nothing else was on the paper.

MR. SHARKEY: He said the name was on there and his address and signature at the bottom. He said the registration was on it. He said he had reported his license and registration were stolen. I can't remember whether the registration was on it.

THE COURT: When was the license validated, September what?

MR. SILVER: September 1, 1971.

THE COURT: September 1, 1971.

MR. SHARKEY: 31 days in August, Judge. September 1st.

THE COURT: The gentleman was in jail?

MR. SHARKEY: Right, Judge.

MR. SILVER: I believe his testimony was that it was approximately a month before his arrest.

MR. SHARKEY: Four or five days.

MR. SILVER: A week before his arrest his car was burglarized.

(60) I might add, if your Honor please, that he did say they examined the two pieces of paper.

THE COURT: I have enough problems. What is your explanation as to what happened to the two items that he suggests he showed the officer, which you say were ultimately stolen?

MR. SILVER: Right. Could I put him on the stand?

THE COURT: Please. I have enough problems.

I am not going to allow that to be marked in evidence.

MR. SILVER: What about the validated license?

THE COURT: Likewise. In the absence of a date or when the application was made, I must deny the request.

MR. SILVER: Yes.

THE COURT: Quite frankly, regardless of which way this case goes, the Court on its own found out where the original duplication was filed and that it may be possible that he got that on September 1st. However, we can't speculate. But somebody had made an application for a new one to issue. That is not before me, either. I can't permit any speculation in law, unfortunately. The only issue now is as to that instrument and I must sustain the objection.

(61) MR. SILVER: With respect to D-1?

THE COURT: Here again, all that is is a validated license for September. D-1 was not in the possession of the defendant at the time, nor do we have the application that was processed for the issuance of this instrument, D-2.

MR. SILVER: May I see the exhibit, please?

THE COURT: I don't want to lose this. That I had to find out about from Pennsylvania. But it is incredible.

MR. SILVER: Just for the record, on the reverse side of this it reads, "Applicant has applied—

MR. SHARKEY: I object.

THE COURT: He is making a record. He has a right to do this. If there is an adverse ruling and he wants to take an appeal, he has a right to make the record complete.

MR. SHARKEY: I want the record to show that this instrument he is reading from is dated December 15, 1971.

THE COURT: I agree. A similar application was shown to the police officer, not anything from Atlantic City.

MR. SILVER: The instrument states, "The above applicant has applied to the Department of Revenue."

(62) THE COURT: Department of Revenue or Department of Motor Vehicles?

MR. SILVER: Revenue, it says, your Honor. "For duplicate" which is checked off under "Operator's License."

THE COURT: Is that the end?

MR. SILVER: I believe that is it.

THE COURT: Now let me hear you.

MR. SILVER: If your Honor please, we think the issue squarely before the Court is a question of credibility whether or not the instruments that were shown to the police officer were, as described by the defendant and corroborated in his father's testimony, the instruments that the defendant received back from the jail when he was released on bail.

They clearly and accurately describe what those instruments state.

If your Honor please, the form, of whatever nature, from Atlantic City simply could not suffice for the renewal or

the validation of the lost or stolen license plate. The defendant explained this away very logically and very coherently by telling us that he told the officer that his license and registration had been stolen in Atlantic City. That is where he (63) got into this problem. That is why he had to make this application. You can't apply in New Jersey for Pennsylvania plates, nor for a Pennsylvania driver's license. He applied for this permission by making application with this Abatt's Agency. This was a procedure, I guess, for reapplying for licenses in the State of Pennsylvania.

Now, in addition to that, the officer had before him, when he first stopped the defendant, an expired license and an expired registration, same names, same addresses, same automobile, same license number. He had further proof. There was no ground at that point, Judge, for suspicion that this was a stolen vehicle.

The officer testified that he stopped the defendant originally because he was speeding at 75 to 85 miles an hour. This was kind of a wild chase, according to the officer's testimony.

We have the testimony of the defendant and corroborated by his father that this car was not capable of such speeds. But even so, Judge, he did not even get a ticket for speeding. That is completely inconsistent conduct with the experience of this officer who testified that the defendant was going 75 to 80 miles an hour. If this was the reason he (64) stopped him, he would have issued him a summons. It is not believable. It is not a credible story that the officer presents to the Court.

Now, your Honor, he had before him four instruments that indicated that the man owned the car, although he could not possibly give him the license and registration

because he did not have them. He gave him the best proof possible. But the officer was not satisfied.

Now, he resorted to what he terms a trick. The officer said he applies this trick to find out if someone actually owns the vehicle.

Now, your Honor, I don't believe that. It's just an effort to get into the vehicle and to add fuel to the fire for a further search. He asked the defendant to open the trunk. The defendant says he opened it a few inches and closed it. The defendant said the officer was not satisfied with that. We are talking about the ownership, if your Honor please.

The officer is suspicious as to whether this is a stolen vehicle. He tells the defendant to open up the trunk.

Now, Judge, in the cases I have researched and have cited in my brief on trickery or obtaining (65) evidence surrepticiously, it throws a question out as to whether or not the defendant had consented to the search. This was the situation where the defendant had no choice but to obey the officer's instructions. As a matter of fact, the defendant went so far as to refuse to open the trunk on two different occasions. That is his testimony. He didn't want to open the trunk, but for obvious reasons, the officer insisted. That is not consent; that is coercion. He is not interested in the ownership of the car by looking in the trunk. He is interesting in testing the defendant's knowledg at what was in the trunk. Even if he was, once he got into the trunk by forcing his way into the trunk, he found out at that point exactly what the defendant had told him was there—a jack, a tire and several boxes.

Okay, he is not satisfied though. The officer wants to go further.

I finally got him on cross examination when I asked him if those boxes were closed.

There's a divergence in the testimony between the defendant and the officer now. The officer says that the boxes are closed and the flaps were down and one box was unsealed and the rest were sealed. (66) The defendant says they were all sealed. Conceding that one box is open and one of the flaps is down. The officer couldn't possibly see anything. He had to go into the box.

Now, Judge, a search commenced at this point when he opened up the trunk. That is the search. Is he looking for the serial number? There is a continuation of that same search. He is in this vehicle and he would like to conveniently separate the trunk from the rest of the car. He can't do it. The cases do not permit it. A search was on. He had to have probable cause at that point. At best, the best that he had was a mere suspicion.

Then, if your Honor please, we come to the part about the officers examining the serial number on the insert in the driver's door. There is another conflict in the testimony. The defendant said it is half way between the top and the floor and the officer, more conveniently, places it at the floor. Be that as it may, he is looking for a serial number after, if your Honor please, he saw glassine bags in the box. He is still looking for the serial number. This is when he starts to look for the serial number, after the glassine bag, so he states, is hanging from underneath the dashboard. That's a fantastic story and I don't (67) believe the Court should accept this testimony. I think in State v. Carlucci, the judiciary in Carlucci talks very frankly there when that went on to say that a police officer is not telling the whole truth merely because he is a police officer. His testimony is as subject to doubt as any other witness.

Is this a logical story? He sees the brown paper bag hanging down from his position behind the dashboard. The dashboard curves toward the hood of the car. If we believe what he tells us, that the bag had a substantial amount of narcotics in it, how was it balanced there? Why hadn't it fallen to the floor? He sees through the rip in the bag and he identifies it. He said this cloth bag contained a white powdery substance. He doesn't even bring a bag into court. How can we make a judgment on what he saw?

I contend, Judge, that this story is not believable and the Court does not have to accept any story, any version, that the police officer gives us just to get under the plain view doctrine. That is what he is trying to do. In other words, that the rest of the search was not any good; that there was no probable cause and that this man was the proper owner of the vehicle. Your Honor, I say he is on a (68) fishing expedition.

How, to get under the plain view doctrine, he finds a bag ripped in such a way that permits him, in the dark of the night, only with a flashlight, to see through it, to see through a glassine bag and he sees a white powdery substance in the glassine bags. Judge, that just is not believable. If he had any kind of legitimate story, he would have brought the bag in for us to see so we could determine whether or not this was possible.

Thereafter, at that time, they searched the vehicle and it turned up a gun for which my client—strike that—a knife, rather, a concealed weapon, which my client is charged with.

Judge, this search is patently defective from start to finish. The prosecution can't take any part at which to commence a search. They had to have probable cause from the outset, your Honor, from the outset, and it is not logical

that this officer, who honestly suspects that this is a stolen vehicle, is going to be looking around the trunk and opening up closed boxes. He admitted it was closed. He had no business to go into the box. After that he still didn't go looking for the serial number. He searched it, and that didn't pan out either. He couldn't come (69) up with anything. There is nothing on the defendant of any nature of contraband.

Judge, the search is defective from start to finish and the prosecutor can't save it by invoking the plain view doctrine.

I submit that my motion be granted and that the evidence be suppressed.

MR. SHARKEY: If your Honor please, what is at issue here is whether or not this evidence which was seized at the scene on the 30th of August, namely, one brown paper bag containing a number of bags of heroin, in boxes in the trunk, and the knife which was also seized from the car, were seized legally.

Now, it is the State's contention, obviously, your Honor, and I am going to argue what the following cases hold. Both the statutory and case law of New Jersey authorize police officers to stop vehicles at random and to demand production of driver's licenses and automobile registration certificates. N.J.S.A. 39:3-29. State v. Braxton, 11 N.J. Super, 119 Appellate Division 1970; State v. Kabayama, 98 New Jersey Super., 85 Appellate Division 1967, affirmed 52 New Jersey 507; State v. Boykins, 50 New Jersey 73, 1967. State v. Hock, 56 New Jersey 526, 533 1969.

(70) Your Honor, just briefly to review the testimony, I think your Honor is as familiar as I am with the facts. This is 4:10 A.M. on the morning of August 30th and Patrolman Adcock is patrolling in area.

THE COURT: 3:30 A.M. was his initial testimony.

MR. SHARKEY: I believe it is 4:10 when the defendant was stopped. It was 3:30 when he was driving in the Bridge Plaza.

Patrolman Adcock observes a 1966 Pontiac with Pennsylvania plates driving west on the Bridge Plaza and he observes a dirty vehicle, with new license plates on the car. The car stops at a gas station. This car pulls out of the gas station and starts down the road and proceeds at a very fast rate of speed. Patrolman Adcock testified the speed was 75 to 80 miles an hour. Now, whether the defendant was disobeying the law is irrelevant because the New Jersey statutes specifically permit an officer to stop an automobile at random, whether or not any traffic violation has been committed, and to demand proof of the operation as to the ownership of the automobile and also to see if he has a driver's license in his possession. Under the law of New Jersey all persons are required to carry on them, or in their possession, (71) or in the automobile at all times, a valid driver's license and proof of ownership of the motor vehicle which they are driving. Patrolman Adcock stopped the car. He asked this defendant to produce his driver's license and registration. The defendant said he couldn't do it. The defendant produced two pieces of paper, which Patrolman Adcock testified were two slips of paper from an Atlantic City agency. There was a name block printed on the left, with a number of lines at the bottom.

After Patrolman Adcock again asked for his license, the defendant said that he lost his driver's license. Patrolman Adcock said there was writing only on one side of these two slips of paper and Patrolman Adcock asked if he had any other means of identifying himself or his automobile. The defendant said no. He said, "Do you have any identifica-

tion?" The defendant said no. Patrolman Adcock said, "Do you mind if we check the glove compartment to see if there are any papers in this car?"

The glove compartment is opened and in the glove compartment there is an expired driver's license and an expired registration with a different set of license plates. Patrolman Adcock at this time has no indication that this man is, in fact, (72) Richard Hamilton or that this is the man who owns the automobile which he is driving. At this time Patrolman Adcock would have been justified in searching that automobile for inditia of ownership. I cite State v. Hock and State v. Boykins, which holds to that. Now, those two cases were in the Supreme Court and were recent cases. It went on to state, "If the operator is unable to produce proof of registration, the officer may search the car for evidence of ownership."

At that point Patrolman Adcock would have been justified in searching the car for proof of ownership. But he didn't at that time. At that time he asked the defendant what was in the trunk. At that time there is some indication as to whether or not the man is in rightful possession of the car.

Patrolman Adcock was not sure as to who opened the trunk, whether the defendant did or Patrolman Adcock. He doesn't remember. He sees these long boxes. There is still no proof of ownership. Patrolman Adcock testified, he testified that he patted down the defendant, that he had every right to do that in the first place to see if he had a weapon on him. Patrolman Adcock admitted that. Then the Patrolman testified as to the serial number being on the door jam (73) of the Pontiac, and he did that to see whether or not that referred to the same car. He still has no indication that this man is Richard Hamilton or that the car belongs to him. He still is perfectly justified in

conducting a search of the automobile. He doesn't do that. He check the door jam. He was justified in opening the door. He stooped down and with his flashlight attempted to look for the serial number and it was at the bottom of the door jam.

Patrolman Adcock testified that the inner lights of the car were on. He notices out of the corner of his eyes a brown paper bag hanging down from the middle of the dashboard. He testified that the bag was split and that he could observe glassine envelopes and a white powder which he said was heroin.

He is testifying from experience on the police force and experience with drugs. He took the bag out and looked at it and placed the defendant under arrest, and it wasn't until then that the complete search of the automobile was conducted.

Your Honor, it is our contention that on the basis of the facts in this case, on the basis of the law in New Jersey as stated in the New Jersey (74) Statutes Title 39 Section 3-29, that Patrolman Adcock was fully justified in stopping that automobile and demanding proof of valid driver's license and proof of valid ownership, regardless of whether or not that vehicle had been involved in a motor vehicle violation.

Under the cases of New Jersey, he was justified in doing that. When Mr. Hamilton failed to produce valid proof of ownership or of his driver's license, or valid identification for himself, that Patrolman Adcock was completely justified, or would have been completely justified at that time in searching the entire automobile. He didn't do that. He didn't go that far. He just checked for the serial number on the door jam. When he did that, he saw the heroin, your Honor, and that heroin was legally seized. It could either have been searched for or it could have been

in plain view. It doesn't make any difference on either ground.

The cases of New Jersey would have held that the search was legal.

Your Honor, the State respectfully requests that you deny the defendant's motion to suppress the evidence.

THE COURT: I want to comment on two things, (75) in view of what you said. You say heroin could have been searched for. I would like to know on what basis you arrive at that conclusion. You just said that. You say it could have been searched for.

MR. SHARKEY: The heroin itself, the search would not have been for heroin. The search would have been for any inditia of ownership. The car could have been searched. What I mean, is that the car could have been searched for inditia of ownership of the automobile.

THE COURT: You said you have no right to search for heroin?

MR. SHARKEY: Well, then, that raises a question, your Honor, of whether or not the search of the trunk is consensual. If so, then Patrolman Adcock would have good cause to search the trunk.

THE COURT: Do you say the search of the trunk was consensual?

MR. SHARKEY: Yes, I do.

THE COURT: On what basis?

MR. SHARKEY: He asked the defendant what was in the trunk. We are not certain as yet as to who opened the trunk.

THE COURT: You just said it was consensual.

(76) MR. SHARKEY: The defendant said: "I have some boxes, a jack and a spare tire." Patrolman Adcock said: "Well, let's open the trunk and check it." And the testimony was that Officer Adcock said, "Do you mind if we open the trunk?" And the trunk on that basis was opened.

THE COURT: You say that was consent?

MR. SHARKEY: I believe so, on the basis of the testimony as we have it. Patrolman Adcock says he is not really certain whether he opened it or whether the defendant gave him the keys or whether the defendant opened it himself. The patrolman is not sure. Patrolman Adcock asked him for the keys and he gave him the keys. I would also contend that that was consensual.

THE COURT: There was a case regarding consensual indication on the part of a defendant. Are you familiar with it?

MR. SHARKEY: No.

THE COURT: Do you contend this is a consensual search of the trunk on what the officer did?

MR. SHARKEY: Yes. Whether it was consensual or not is not really material and relevant if it uncovered hereoin in front of the defendant.

THE COURT: You say, one, you concede you have no right to search for heroin.

(77) MR. SHARKEY: Well, that, of course, will turn on whether or not the search of the trunk was consensual.

THE COURT: Which way are you going to go?

MR. SHARKEY: Well, Judge, if the search of the trunk was consensual, then it is our contention that these six boxes which fell into view, the glassine bags, would

have constituted probable cause to search the car for heroin at that time.

THE COURT: Do you contend the search was consensual?

MR. SHARKEY: Yes. That is just one side of the case. It is also our contention that when the defendant could not produce a valid license and valid registration, Patrolman Adcock was justified to search the automobile for inditia of ownership. Anything revealed as a result of the search is certainly admissible in a trial.

THE COURT: Now, tell me when the arrest occurred.

MR. SHARKEY: When the arrest occurred, your Honor? The arrest occurred, according to Patrolman Adcock's testimony, after the heroin was discovered. He wasn't arrested for being in possession of a stolen vehicle.

THE COURT: When do you contend he was arrested?

(78) MR. SHARKEY: He arrested him after he discovered the heroin, your Honor. He took thet paper bag, as he stated, out from the automobile and saw that the bag contained heroin and arrested the defendant at that time.

THE COURT: What do you say about the testimony of Adcock who says after he saw the boxes and the glassine bags in the trunk, he had the defendant stand by the car and he called for assistance? When did the arrest occur?

MR. SHARKEY: As I say, your Honor—

THE COURT: Do you contend that is not an arrest?

MR. SHARKEY: Calling for assistance is not an arrest.

THE COURT: What do you say about him standing by the car? Do you call that detention for a few minutes to check the automobile for inditia of anything?

MR. SHARKEY: That is my contention, your Honor.

THE COURT: When he did that?

MR. SHARKEY: He can't stoop down and check the serial number on the door jam when he is there with the defendant and no one over there to watch the defendant for him. He was detaining him to check (79) the automobile for inditia of ownership. He called for assistance because he can't check the serial number with the defendant standing by himself at the side of the car.

THE COURT: Well, after he looks and he sees the boxes he says: You stand here. Stand over there. He is in uniform in the patrol car. He looks in the trunk and he says: You stand over there. He calls for help. Then I assume you're going to tell me that he wasn't under arrest yet?

MR. SHARKEY: That's what Patrolman Adcock said.

THE COURT: Is that your contention?

MR. SHARKEY: Yes, Judge.

THE COURT: He is not under arrest at that point? He was doing this for his own protection.

MR. SHARKEY: Yes, Judge. That is our contention.

THE COURT: On the basis of the arrest, he had a right to pat him down for his own protection. That is what was held in the Campbell case. They found lottery slips on the defendant in that case.

MR. SHARKEY: It is our contention he is still searching for the serial number.

THE COURT: You contend that that wasn't an arrest, the pat down?

(80) MR. SHARKEY: The pat down itself was not an arrest.

THE COURT: That's the whole totality of the whole circumstances, after he says he looked into the trunk?

MR. SHARKEY: He may have—

THE COURT: You better tell me. This is the way this case is going to ride. You have to take a position. You say it may have been. You tell me. Because, frankly, it is the crux of the whole case.

MR. SHARKEY: Well, your Honor, it is our contention that at the time the defendant was unable to produce a valid license and registration, the car was searched. So he could have been placed under arrest at that time. The defendant wasn't placed under arrest at that time.

THE COURT: The official things that he says means nothing to the Court. The police officer tells him to stop, prevents him from proceeding where he was going. For all intents and purposes your freedom has been detained, hasn't it?

MR. SHARKEY: That's right, your Honor.

THE COURT: The law says that it's tantamount to arrest, isn't that so?

MR. SHARKEY: Well, it is our contention the (81) man was officially placed under arrest after the heroin was discovered by Patrolman Adcock.

THE COURT: You were talking about consensual. What do you have to say about trickery?

MR. SHARKEY: At the time Patrolman Adcock testified it was a police trick, I don't think he meant trick in the sense of, well, it is another scheme, or a device which

the police sometimes use. They use it to determine whether or not a person who is in possession of the car has any rightful possession to same. If the person stopped can identify the things in the trunk, it is more likely than not that he is in rightful possession. I don't think it is good police practice. It is a common police practice.

THE COURT: I hope it is stopped. I'll tell you that.

MR. SHARKEY: It is common police practice regarding a questionable occupant.

THE COURT: A questionable occupant?

MR. SHARKEY: In this case on the basis of the documentation he produced.

THE COURT: What else do you want to say?

MR. SILVER: Simply, as I understand the law of the Federal courts and in New Jersey, the right (82) to arrest must precede a search and the officer can't search in order to arrest, nor can the arrest be the product of the search.

THE COURT: That was Boyle. That was tried right here in Bergen County by the prosecutor's office about 12 years ago.

MR. SILVER: There was no basis for the arrest when he examined the different documents. The defendant showed him proof of ownership. Nor was there a right to arrest when he opened the trunk. Nor was there a right to arrest when he saw some glassine bags in a box; nor was there a right to arrest when he patted him down. Nor was there a right to look at the insert in the vehicle for the serial number. In the meantime, the search is going on, Judge. This is the idea of the search. You just can't stop a defendant and say it was plain view. And then proceed to search. You have to have a basis for an arrest. A search had been going on. In the meantime, he walked the

defendant around out of the car and got him to open up his own glove compartment.

When he went in the box and then found the glassine bag, it is tainted and it was a bad search. He had no business being underneath the dashboard.

THE COURT: What do you have to say to the Court, (83) not having seen any of this evidence, has no idea of what it looks like, a bag or boxes, or anything else? What do you have to say about that?

MR. SHARKEY: This matter was set down for January 24th. Patrolman Adcock was here with the evidence on the 24th of January.

Your Honor is aware of the numerous problems the prosecutor has with the chain of evidence. We like to get in all of the police records, as long as we have them. But on January 25th, we didn't have it.

THE COURT: It could have been offered today.

MR. SHARKEY: Your Honor wouldn't let me put Patrolman Adcock back on the stand.

THE COURT: Adcock took the stand.

MR. SHARKEY: There was no testimony regarding this on direct or cross-examination by this witness. You said I couldn't put him back in rebuttal for the purposes of contradicting what was said before.

THE COURT: I said that was the law with respect to rebuttal.

MR. SHARKEY: You limited me to that extent, your Honor. That is the reason I wanted to put Patrolman Adcock back on the stand, to continue his testimony, which I was prevented from doing, Judge.

(84) THE COURT: I thought that is what you were going to do.

MR. SHARKEY: Patrolman Adcock has testified as to the amount you could see. He testified it was a brown bag. There was a split a few inches long. He said the interior lights of the automobile were on. We know of no shining of a flashlight in the interior of the car when he was searching. He said he could look through the two-inch split in the bag. Just on the basis of Patrolman Adcock's testimony, that is enough to sustain the burden in this case. If you want us to present anything further, we can do it. But I don't think it is essential for the purposes of this ruling.

THE COURT: I want to read some law here. We will adjourn for the day.

(Court adjourns until March 7, 1972.)

— — —

(85) SECOND DAY, MARCH 7, 1972
HACKENSACK, NEW JERSEY

THE COURT: Is there anything you wish to add to that which has already been suggested?

MR. SILVER: Nothing, your Honor. I have made my arguments. Of course, I am relying on the briefs that have been submitted by the defendant in this matter.

THE COURT: Speaking of the briefs in respect to both parties, for the prosecution as well as the defense, I note both of you do not, in your briefs that have been filed, with respect to which the Court has examined at length and certainly has taken into consideration, refer to one of the leading cases. It can be located at 57 New Jersey, 286. Neither one of you learned gentlemen included that citation.

MR. SILVER: I relief—he cited it first, your Honor. I relied on his citation.

THE COURT: I just call that to your attention.

MR. SHARKEY: That was a mistake on the part of the State, your Honor. In the memorandum submitted, regarding that case, there was a per curium reversal by the Supreme Court. I relied on that when I had it with me today in court to present my argument. (86) I cited it improperly in my memorandum.

MR. SILVER: In my research, I only had his citation. I read that Supreme Court decision.

THE COURT: In any event, I want to call to your attention the fact that the Court does read these things.

Well, gentlemen, needless to say, this does present a problem to the Court. Certainly it is a grave problem concerning all parties.

This being a warrantless search, the obligation in a motion to suppress is on the State. Many of the facts presented did not seem to be disputed.

However, there does appear to be some question as to certain times. Suffice it to say that sometime around 3:30 A.M., whether it is 4:00 A.M., I don't believe it makes a great deal of difference. The testimony seems to indicate that Officer Adcock observed a 1966 Pontiac leaving a gas station and proceeded at a high rate of speed west on Route 46 going somewhere, as the testimony indicated, at 75 to 80 miles an hour.

In addition to that, his observation indicated that there was a rather dirty car with new Pennsylvania plates. He subsequently apprehended the vehicle in question. He said he made an inquiry as (87) to the ownership and operation certificates and that they were not presented. But the driver of the automobile, the defendant at bar, Richard Hamilton, suggested that his automobile, or the

contents of same, at one time had been stolen and that among them was the certificate of ownership and driver's license and that he had made an application in Pennsylvania for a duplicate to issue.

Officer Adcock says, in his testimony, he was just shown something there with the heading that stated "Atlantic City." He doesn't know who signed it. This part of the testimony left a great deal to be desired. But that was his testimony.

It was here that there was a conflict because the defendant said they were in effect two notarized instruments from an agency in Pennsylvania.

Officer Adcock subsequently indicates that that had caused him to look in the glove compartment where he observed some outdated registration or license. There is some question as to what attitude the defendant exhibited at that particular time.

Subsequent thereto, and very candidly, the officer admits a foreign practice sometime, I believe, a trick is used to ascertain: Does the driver know the contents of the trunk. The defendant's reply was (88) that there was boxes, a spare tire, a jack.

Then there was some question whether the defendant or the police officer actually opened the trunk. But the key did fit. Nonetheless, there was some colliquy with respect to the same. When the trunk was opened, it was readily admitted that the spare tire and a jack and boxes were in the trunk.

There then developed some question as to whether or not Officer Adcock had occasion to open some of the boxes. But be that as it may, there was some testimony that the defendant indicated that these were boxes with

a type of bag that was used, glassine bags, for garlic. Seeds, as I recall it.

On cross-examination, it developed, the officer said he probably opened the box.

Then pursuing that, Mr. Hamilton was told to stand by; assistance was asked for; assistance arrived. The defendant was patted down and at that time assistance arrived.

Officer Adcock continued to make inquiry and examined the door posts, which required him to bend down, using his flashlight. He did kneel down and when he did, he observed a bag with an opening and with white powder in it and in his judgment, he believed it to be heroin.

(89) The defendant was arrested and a thorough search was made.

I point out on the record the Court did not have the benefit of examining the brown bag nor the contents or the boxes that were in the trunk. I suggest this should have been done in the event a similar situation develops. It would be better practice to have that presented to the Court.

Then, of course, the defendant takes the stand, as well as the defendant's father. The defendant testifies that he, after leaving the Esso station, had observed the police car and he saw the flashers. He testified he would not have been able to accelerate at that rate of speed. He does acknowledge the officer stopped the automobile and that when asked for the certificate of ownership and driver's license, he could not produce same, but produced two documents with the heading "Abatt Agency, Pennsylvania." This is in conflict. Of course, unfortunately, these instruments referred to by the defendant were not presented in court. The explanation being that some-

time subsequent these articles were stolen and their whereabouts is unknown.

The defendant further testifies that it is not in dispute as to what the glove compartment produced, (90) that it produced some expired registrations.

However, it may be significant to note that the serial number on the expired registration was different, or the plates was different than that on the card.

It is acknowledged, then, that there was an inquiry as to what he had in the trunk. He explained that it was a jack, a tire and some boxes. Here we have a dispute as to whether or not the officer opened the trunk or the defendant and it is conceded there is a factual question as to credibility in that respect.

But, in any event, again the trunk was opened. The key fit and the articles were there, and the defendant said in effect that the police officer opened the boxes and they had this conversation relative to the type of bag that was there. And, again, these boxes and its contents were not presented to the Court.

The defendant then would suggest that the police officer could not have made an observation the way he explained he did. He explained away about about the dashboard and where the broadcast part would be located on the LeManns Pontiac and, in fact, he said the officer proceeded to search the (91) vehicle. He said many officers arrived and they all proceeded to strip the automobile. I believe that's his testimony in respect to the same.

The father, likewise, takes the stand and in the main his testimony had to do with respect to the temporary registration which permitted him to take the automobile and that the condition of the automobile was such that

the officer could not have made an observation of the speed of 75 to 80 miles an hour.

There was some rebuttal testimony. But, again, the Court allowed over objection—again, we don't have in evidence the items suggested to be suppressed presented to the Court and this presents somewhat of a problem.

As always, the issue is obvious. Credibility, of course, is a main issue. What could the officer have seen and the right to act in the manner that they did, no summons having been issued? Suffice it to say I will somewhat consider certain items in inverse order so we can dispose of them all quickly.

But as to the patting down that occurred at this particular time, I don't need comment any further, other than state that the matter has been handled in State v. Campbell. It is good police work. So we can dispose of that item particularly considering the (92) officer being alone at that time, 4:00 A.M. in the morning and in an isolated section on Route 46.

I had a little difficult problem, a little more difficult problem with respect to the trunk, and this Court suggests that if this is a common practice among the police department operating in our jurisdiction, it is frowned on because, concededly, it is a device coercive in nature, and as candidly referred to by the police officer as trickery and under ordinary circumstances should be avoided. Because it would seem to this Court that a defendant who is not informed that a search of a trunk would not be made if he did not consent, did not and could not intelligently and voluntarily consent to a search of the automobile from which incriminating evidence may be found. I think this is the language of the Fourth Amendment.

Perhaps another way, the Court suggests that a waiver cannot be valid unless the person knows that his permis-

sion may be freely and effectively waived. So we dispose of the trunk question.

It would seem to me that the law of search and seizure in automobiles is not different from such law governing search of a person for fixed premises. The problems of searches of vehicles is an inditia (93) between suspicion and probable cause. The citizen who is given no cause or belief that he has committed or has engaged in the commission of a crime is entitled to proceed on his way without interference.

Yes, while law enforcement authorities have the duty to make investigations under suspicious circumstances, there is no right to search unless there is probable cause to arrest. Probable cause must exist before the arrest. It must not depend on what the search reveals.

Although, in view of the great mobility of automobiles the concept of reasonable ability is somewhat extended in such cases as Carroll v. United States.

The Supreme Court of our land has held, and has not as yet indicated, that the requirement of probable cause was less constrained for an incidental search of the automobile than the private residence.

As in Howard v. United States, which is 361 U.S., referring to the Carroll case, liberalize the rule governing searches where a moving vehicle was involved. But the decision merely relaxed the requirements of warrant on the grounds of practicality. However, it did not dispose with the need for probable cause. An example of that, of course, is Campbell v. (94) The United States, where the operator of an automobile started to drive away, about to put his lights on and was stopped. When the driver alighted from the car to show his registration to the officer, the dome light disclosed articles in the automobile

which had been reported stolen from another vehicle in the same area, and the defendant, of course, gave no adequate explanation as to the acquired articles.

The officer in that case accordingly took the man and the articles to the precinct, to the stationhouse, for further interrogation. Probable cause for the arrest having been found, it was sufficient to support the search and the waiver of the stolen articles.

Now, another interesting case is State v. Valente, and that is an early case. Of course, it is in New Jersey Super where the validity of the arrest, a traffic violation, cannot be disputed. The police officer was authorized by statute to arrest without a warrant any person violating in his presence the provisions of the traffic act be it (95) 39:5-24 or 39:3-29, as in this case. Nor can it be disputed that a search may be an incident to an arrest if reasonably necessary to protect the arresting officer from attack and preventing the arresting officer from attack and preventing escape or preventing obstruction of the evidence.

That's the Boykins precedent, and so many others. But evidence, Mr. Prosecutor, of transgression of a traffic law does not authorize a general search of their person or of the vehicle involved. The guidelines, however, Mr. Prosecutor, for the scope of the primary search permissible under certain circumstances are laid down by our Chief Justice in Boykins. In that case it sets forth the recent guidelines as to preliminary searches. I believe it's at page 77 of that case where the Chief Justice went on to say: "Surely not every traffic violation will justify a search of every part of the vehicle. A traffic violation as such will justify a search for things related to that fact."

For example, if the operator is unable to produce certification, the officer may search the car for evidence of ownership, or if the officer has reason to believe that the

driver is under the influence of drugs or liquor, he may search the car for liquor or narcotics. I believe that was the (96) Parker case in New Jersey, a similar matter referring to this type of evidence. State v. Parker is more specifically enunciated in that decision.

The facts in the Boykins case where the search was explained as being reasonable and legal, in that case, the operator was travelling at high speed and stopped by the police officer and directed to pull over to the curb and as I recall, he subsequently attempted to evade the officers by a high speed chase through the city. Shots were fired in the case, as I recall, and ultimately one of the occupants was found dead. It would seem to me the Boykins case falls within the purview of this instant case.

The defendant was stopped for traffic violation and subsequently with probable cause the officer conducted a search. It cannot be said that when the officer stopped the vehicle on Route 46, after ending up a chase at a speed of 75 to 85 miles an hour and a subsequent inquiry for license and registration, which the defendant was unable to produce, and coupled with the story by way of the articles being stolen and, further, the observation of the officer as to the type of vehicle, a dirty vehicle with clean license plates, from these set of facts the Court finds it may have been suggested that the defendant (97) had in his possession a stolen motor vehicle. Certainly it did call for further inquiry and, further, the defendant could have been arrested at that time for the violation that I have referred to requiring a certificate to be in his possession while operating a motor vehicle.

We couple this further that it was while the officer was checking the number on the door post, with or without the flashlight, it makes no difference, because there is the Williams case that says: The use of the flashlight is not a

violation of your privacy. The officer was directed to this brown bag under the dashboard where he indicates he noted a white powder that he believed to be heroin. His belief reasonably warranted the examination certainly of the whole automobile.

I find from the testimony in the case that Officer Adcock's testimony is not incredible under the circumstances and that the officer had a right to arrest the defendant initially when he could not produce proper registration of ownership.

Under the totality of the circumstances, in the manner he conducted the search, I find that the officer did not violate any privacy of the defendant and certainly was not in violation of any privilege (98) particularly the Fourth Amendment, the reasonableness or the attitude suggested by the officer in the manner he conducted same.

I will deny your motion and I will proceed to trial with the jury.

MR. SHARKEY: May I have a few minutes, your Honor?

THE COURT: I don't know whether we will or not. We have to get on.

MR. SHARKEY: Okay, Judge.

— — —

I, LEO L. WEBERMAN, an Official Court Reporter of the State of New Jersey, do hereby certify that the foregoing is a true and accurate transcript of the proceedings as taken stenographically by me at the time, place and on the date hereinbefore set forth.

/s/ Leo L. Weberman
LEO L. WEBERMAN
OFFICIAL COURT REPORTER

Appendix D

Judgment of Conviction

June 29, 1972

VIOLATION N.J.S. 24:21-20a(1)
24:2-19
2A:151-41

Indictment—Poss. Dang. Substance (1st Count), Poss. Dang. substance with intent to distribute (2nd Count), for viol. of weapons law (3rd Count), No. S-1469-71.

Term—September, 1971

Stated Session—First

Filed:—October 20, 1971

Arraigned:—November 19, 1971

Plea:—Not guilty by Mail

Retracted:—

Trial:—By jury—March 7 and 8, 1972

Verdict:—Guilty (1st Count) Not Guilty (3rd Count) Mistrial (2nd Count).

Sentence:—1st Count: The defendant was sentenced to not less than 3 nor more than 5 years in New Jersey State Prison.

Reason for imposition of sentence (Rule 3:7-10(b):—

Determination of sentence (Rule 3:7-10(c):—This defendant was neither convicted nor sentenced under the Habitual Criminal Act.

/s/ Fred C. Galda
HON. FRED C. GALDA
JUDGE

/s/ James L. Cairns
JAMES L. CAIRNS
CLERK

Appendix E

Notice of Appeal to the Superior Court of New Jersey, Appellate Division

TO: David Lucas
Acting Prosecutor
Hackensack, New Jersey

and

The Honorable Frederick Galda
Judge of Bergen County Court
Court House
Hackensack, New Jersey

TAKE NOTICE that Defendant-Appellant, Richard Hamilton, residing at 5736 Lanstowne Avenue, Philadelphia, Pennsylvania, hereby appeals to the Superior Court of New Jersey, Appellate Division, from the judgment of the Bergen County Court, entered June 8, 1972 adjudging said defendant guilty of violating The First Count of the Indictment violating N.J.S. 24:21-20 on which said Court imposed sentence of not less than 3 nor more than 5 years in the New Jersey State Prison for violation of N.J.S. 24:21-20.

/s/ Michael W. Silver
Attorney for
Defendant-Appellant

Service of a copy of the within Notice of Appeal is hereby acknowledge this day of June, 197 .

/s/ Robert Holopy
Law Secretary to
Judge Fred Galda

I hereby certify that on I served upon the stenographic reporter who reported the cause, a written

request for the preparation of one original and one first carbon copy of the transcript in this proceeding and deposited with him a sum sufficient to pay such fees as may be required by law, and that a copy of such request was sent to the stenographic reporter supervisor of Bergen County.

/s/ Michael W. Silver
Attorney for
Defendant-Appellant

Appendix F

Opinion of the Superior Court of New Jersey Appellate Division—A-2855-71

Argued January 9, 1973—Decided January 24, 1973.

Before Judges Labrecque, Kolovsky and Matthews.

On Appeal from Bergen County Court.

Mr. Michael W. Silver argued the cause for appellant.

Mr. Steven E. Pollan, Deputy Attorney General, argued the cause for respondent (Mr. George F. Kugler, Jr., Attorney General of New Jersey, attorney).

PER CURIAM

Defendant appeals from his conviction for possession of heroin contrary to N.J.S.A. 24:21-20(a)(1), arguing that it was error to deny his pretrial motion to suppress evidence found during a warrantless search of his automobile.

Defendant was driving his 1966 Pontiac in Bergen County in the early morning hours when he was stopped by an officer for speeding. He was unable to produce his license or registration. Upon opening the trunk of his car, there were revealed boxes of what defendant represented to be small bags used to package garlic seeds. When the officer opened the door on the driver's side to check the serial number of the vehicle he observed a paper bag to the center of and below the dashboard, which had been ripped. Through the opening he could see what appeared to be a glassine bag containing a white substance. The trial judge denied defendant's motion to suppress the articles found and defendant was convicted and sentenced to 3 to 5 years in State Prison.

On the basis of the State's proofs, which the trial judge chose to believe, we hold that the motion to suppress was properly denied. The condition of the license plates on defendant's car, his failure to produce a driver's license or registration, the makeshift nature of the paper he produced in lieu thereof, his inability to produce other identification, the subsequent discovery in the glove compartment of an expired Pennsylvania permit and a registration representing a similar make vehicle but with a different license plate number, the fact that the keys to the car were not General Motors originals, and defendant's statement to him that the contents of the boxes in the trunk were not glassine bags afforded an adequate basis for a reasonable suspicion on the part of the officer that the car defendant was driving had been stolen. Good police work dictated that he investigate this possibility immediately and justified the search and arrest which followed. See State v. Waltz, 61 N.J. 83 (1972); State v. Gray, 59 N.J. 563 (1971); State v. Hock, 54 N.J. 526, 533 (1969).

Affirmed.

A TRUE COPY

Mortimer G. Newman, Jr.
Clerk

Dep. Atty. Gen. Packel
Justice O'Brien, 6-1 decision, Jan. 31, 1973, Phila. Inquire.

Appendix G

Order of the Supreme Court of New Jersey C-454 September Term 1972 Denying Defendant's Petition for Certification
(Filed May 29, 1973)

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon Ordered that the petition for certification is denied.

Witness, the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 29th of May, 1973.

/s/ Florence R. Peshoe
Acting Clerk

SUPREME COURT, U. S.
Supreme Court, U. S.
FILED
OCT 3 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-445

RICHARD T. HAMILTON,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GEORGE F. KUGLER, JR.
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR RESPONDENT
STATE OF NEW JERSEY
STATE HOUSE ANNEX
TRENTON, NEW JERSEY 08625

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LEGAL ASSISTANT
ON THE BRIEF

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561 Broad St., Newark, N. J. (201) 643-4292

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-445

RICHARD T. HAMILTON,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTER-STATEMENT OF THE CASE

On October 20, 1971, the petitioner was charged in Bergen County Indictment No. S-1469-71 with possession of heroin, contrary to *N.J.S.A.* 24:21-20 (a) (1), possession of heroin with intent to distribute, contrary to *N.J.S.A.* 24:21-19, and possession of a dangerous weapon, contrary to *N.J.S.A.* 2A:151-41. (Pa-1).

Prior to trial, petitioner's motion to suppress pursuant to *R.* 3:5-7 of the Rules Governing New Jersey Courts was heard by the

Hon. Fred C. Galda, J.C.C. The motion was denied.

Petitioner was tried before Judge Galda and a jury, and was found guilty of unlawful possession of heroin. He was found not guilty of the weapons charge. A mistrial was declared with respect to the charge of possession of heroin with intent to distribute. Petitioner was sentenced to not less than three years nor more than five years in the New Jersey State Prison. (Pa-115).

The denial of the motion to suppress was appealed to the Superior Court, Appellate Division. (Pa-116). The denial was affirmed on January 24, 1973. (Pa-118). A petition for certification to the New Jersey Supreme Court was filed by petitioner on May 29, 1973, which was denied. (Pa-120).

This Petition for Certiorari was filed on September 7, 1973.

COUNTER-STATEMENT OF FACTS

Officer Albert Adcock had been an employee of the Bergen County Police Department for the last six and one half years. (1T2-12 to 2-14).[1] At 4:10 A.M. on August 30, 1971, he observed a 1966 Pontiac with a Pennsylvania license plate in the area of the George Washington Bridge. (1T2-22 to 3-7). Officer Adcock stated that his attention was drawn to this car because it was dirty, except for a clean, new license plate. He followed the car along Route 46 and observed the vehicle enter a gas station. (1T3-8 to 3-12).

The officer entered an adjacent gas station and waited for the petitioner to conclude his business. Petitioner then exited the gas station onto the highway and proceeded westerly at a high rate of speed. In fact, Officer Adcock testified that he was forced to pursue it at 75 to 80 miles per hour in order to overtake it. (1T3-13 to 3-24). The petitioner then cut off onto an exit ramp. Officer Adcock ordered him to pull over; petitioner complied. (1T3-25 to 4-7).

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[1] "1T" refers to the testimony taken on January 24, 1972. "2T" refers to the testimony taken on March 6 and 7, 1972, the adjourned date of the hearing.

Once stopped, Officer Adcock requested petitioner's license and registration. The petitioner, however, was unable to produce either a valid license or a valid registration. He did produce two slips of white paper. According to Officer Adcock, each piece of paper had "Atlantic City" across the top; one such slip said "reported registration missing," and the other said "reported license missing." Adcock also stated that in his opinion, neither was signed by a police officer. (1T4-12 to 4-19). When asked for an explanation, the petitioner told the officer that his license and registration had been stolen a week earlier in Atlantic City. (1T4-20 to 4-24). The petitioner was unable to provide any other identification because, as he told the officer, his wallet was also stolen at the same time. (1T4-25 to 5-3). Officer Adcock finally asked the petitioner if he had anything at all that would substantiate his ownership of the car—such as insurance papers, repair slips, and the like—and the petitioner replied that he did not. (1T-4 to 5-10).

Officer Adcock then requested the petitioner to open the glove compartment of his automobile. Inside was an expired Pennsylvania permit and registration for a similiar make automobile bearing a different license plate number. In addition, there was an automobile serial number on the expired registration. (1T5-10 to 5-22). Officer Adcock then testified as follows:

> Q. What happened then?
> A. I asked him if he could tell me exactly what was in the trunk of the vehicle, exactly the items that were in the trunk of the vehicle.
> Q. What was the purpose of this question?
> A. This was a policy or it's a thing that you do. It's a quick way to find out of somebody owns the car or not by asking them if they've had the car a while what's in the trunk. If they can name the items in the trunk, you can pretty well assume the car is their's. It's not positive, but it gives you a good indication of which direction you're going to go.
> (1T8-3 to 8-14).

The petitioner agreed to open the trunk, and Officer Adcock asked him for the keys. At that time, he noticed that the keys were

not original General Motors keys but rather duplicate blanks. (1T8-20 to 8-25). The petitioner described the contents of his trunk as consisting of a spare tire, a jack, and several small boxes. When the trunk was opened, the objects described by the petitioner were in the trunk. (1T9-1 to 9-7).

Adcock then asked the petitioner about the contents of the small boxes in the trunk. Petitioner initially replied that "It could be anything," but later added that they contained small bags used for the packaging of garlic seed. Adcock then asked if they might be glassine envelopes, and the petitioner said they were not. Adcock observed that the boxes were all sealed with the exception of one, but the flaps on this unsealed box were closed. He opened it and observed a quantity of glassine envelopes. Adcock then called for assistance. (1T9-1 to 9-25).

After assistance arrived, Adcock walked toward the front of the car, opened the driver's door, and squatted down to check the serial number of the car against the number recorded on the expired registration. He stated that the serial number was located on the lower portion of the door jamb. As the officer testified:

> Q. What did you observe at this time?
>
> A. I squatted down, got my flashlight out to check the serial number. While I was looking at the serial number plate, I looked up eye level and in the center of the dashboard was a bag, a paper bag, and the bag was ripped and inside of the bag I could see what appeared to be a glassine bag or wrapping with a white substance in it.
> (1T10-16 to 10-22).

The substance proved to be heroin, and it was later the subject of the petitioner's conviction.

On cross-examination, Adcock stated that he did not remember if he had ever given the petitioner a speeding ticket. (1T14-12 to 14-16). He further stated that he did not recognize the two slips of paper originally handed to him by the petitioner, and that he had never seen anything like them before. (1T16-1 to 16-10). He admitted that upon opening the trunk, it was impossible to see inside the boxes since the flaps were closed. (1T23-4 to 24-4).

The petitioner testified in his own behalf. On the night in question, he was coming from the George Washington Bridge and was on his way home toward Philadelphia. (2T6-15 to 6-20). He stopped for gas, and then left the gas station at a slow rate of speed. In fact, the petitioner stated that he observed Adcock's police car in the adjacent gas station and purposely drove slowly. (2T6-23 to 7-15).

Upon being stopped by the officer, the petitioner was asked for his license and registration. (2T7-21 to7-23). The petitioner insisted that he showed the officer notarized documents indicating that he had reapplied for his license and registration. The petitioner claimed he had received them from Abatt's Automobile Service in Philadelphia, and that these documents were valid for a period of 30 days, during which time it was legal to drive in Pennsylvania. (2T11-4 to 11-17).

The petitioner at trial, was unable to produce copies of these documents, claiming he had misplaced them. In addition, he was not able to produce the expired registration and license in his possession at that time, because, according to his testimony, the car was stolen after the events on the night in question. (2T10-17 to 11-25). He also claimed that he was coerced into opening the trunk by Officer Adcock. (2T13-8 to 14-5). The petitioner stated that it was impossible to observe the bag with heroin in it while looking at the serial number of the car, because he had changed the location of the serial number after he had purchased it. (2T18-2 to 18-16). Finally, it was revealed that the petitioner had a criminal record which included possession of marijuana and interstate transportation of a motor vehicle. (2T18-17 to 19-6).

REASONS FOR DENYING THE WRIT
POINT I

THE DISCOVERY OF THE BAG CONTAINING HEROIN FOUND UNDERNEATH THE DASHBOARD WAS NOT THE RESULT OF IMPROPER POLICE CONDUCT.

Petitioner contends that Officer Adcock engaged in an unreasonable and illegal course of conduct which resulted in his detention for an unduly prolonged period of time. As a result, he claims that the discovery of the heroin was a fruit of his illegal detention, and therefore must be suppressed. The Respondent respectfully submits that the discovery of the heroin was not the result of improper police conduct.

The trial court, in making its factual determinations at the Hearing on the Motion to Suppress, found the testimony to indicate that Officer Adcock observed petitioner driving west on Route 46 at approximately 75 to 80 miles an hour. It is axiomatic that if a violation of the motor vehicle laws is observed, the driver may be stopped and issued a summons or arrested. Since speeding is a motor vehicle offense under *N.J.S.A.*39:4-98, the petitioner's stop and subsequent arrest would be entirely proper.

Furthermore, law enforcement officials are expressly authorized under *N.J.S.A.* 39:3-29 to stop motor vehicles at random and demand production of the operator's driver's license and motor vehicle registration. *State v. Kabayama,* 98 *N.J. Super.* 85 (App. Div.) 236 *A.2d. 164 (1968),* aff'd. *o.b.* 52 *N.J.* 507, 246 *A.2d.* 714 (1968). The legality of such stops, within the context of the Fourth Amendment, cannot seriously be questioned. For example, in *Lipton v. United States,* 348 *F. 2d.* 591 (9th Cir. 1965), an officer stopped aminor driving an out-of-state automobile on a hunch aroused by the driver's youthful appearance. The driver could not produce either a license or identification. Upon further inquiry, the officer was able to obtain more detailed information. In upholding the stop, the court stated:

> "If stopping appellant for the sole purpose of inquiring whether he held a license for the activity in which he was engaged was in any sense a 'seizure,' it

was not an 'unreasonable' one, and did not violate any right given appellant by the Fourth Amendment." *Id.* at 593.

In addition, in New Jersey, once a driver is detained in this manner, the failure to produce a registration or a valid license empowers the officer to arrest the driver. See *N.J.S.A.* 39:5-25.

It cannot be disputed that Officer Adcock was acting within his authority in stopping the petitioner for speeding. Nor is it claimed that the search of the glove compartment was invalid. However, petitioner maintains that the subsequent search of the trunk and the cardboard box therein was unconstitutional because no consent was given, and because it could not be justified as either incident to a valid arrest, or as a limited search to determine ownership of the automobile. As a result, he argues that: (1) the search resulted in his illegal detention, and (2) the discovery of the heroin was the fruit of the illegal search, necessitating it's exclusion from evidence.

A. Petitioner's Failure to Produce a Valid Driver License or Reigstration Certificate, Coupled With the Circumstances Confronting Officer Adcock, Provided the Officer with Probable Cause to Search the Trunk and Box Therein.

The Fourth Amendment of the United States Constitution protects against only unreasonable searches and seizures. The exclusionary rule is a judicial mechanism intended to enforce that protection by prohibiting the introduction of illegally seized evidence in criminal prosecutions. *Mapp v. Ohio*, 367 *U.S.* 643 (1961). This proscription is directed toward the overzealous police officer who would utilize his office to invade unreasonably the privacy of an individual. The rule is not designed to rectify the wrong already done, but to deter continued or future insolence in office, thereby protecting the reasonable expectations of privacy of individual citizens. Yet, suppression of such evidence does not penalize the insolent. Instead, the right of the innocent to be protected from crime is impaired, while at the same time the image of justice is eroded. The law-abiding citizen loses as the rate of crime spirals and the guilty go free. See *State v. Bisaccia*, 58 *N.J.* 586, 279 A.2d. 675 (1971).

The rights of the law-abiding citizen are no less than those of the criminal. But the Bill of Rights is not intended to apply only to the innocent. Thus, in each case where suppression is sought, the court is called upon to reconcile competing values. *State v. Davis*, 50 *N.J.* 16,231 A.2d. 793 (1967), *cert.* denied 389 *U.S.* 1054 (1968). In striking this balance, the court must determine whether the character of the particular intrusion upon the person or his property was reasonably appropriate under the circumstances confronting the police officer when the search was made. *Terry v. Ohio*, 392 *U.S.* 1,22 (1968).

The test of reasonableness cannot be stated in rigid and absolute terms but is dependent upon the factual transaction viewed in a common sense manner. *State v. Gosser*, 50 *N.J.* 438, 236 *A.2d.* 377 (1967), *cert.* denied 390 *U.S.* 1035 (1968); *State v. Daniels*, 46, *N.J.* 428, 217, A.2d. 610 (1966). Further, in determining the reasonableness of a search, the common and specialized experience and workaday knowledge of a law enforcement officer must be taken into account. *State v. Contursi*, 44 *N.J.* 422, 209 A.2d. 829 (1965).

"What (then) is the test of reason which makes a search reasonable? The test is the reason underlying and expressed by the Fourth Amendment: the history and the experience which it embodies and the safeguards afforded by it against the evils to which it was a response." *Chimel v. California*, 395 *U.S.* 752, 765 (1969), quoting from *United States v. Rabinowitz*, 339 *U.S.* 56, 83 (1950) (dissenting opinion of Frankfurter, J.). The principal evil sought to be forestalled is the invasion of individual privacy by wholesale exploratory searches conducted under the color of governmental authority. *Warden, Maryland Penitentiary v. Hayden*, 387 *U.S.* 294, 301 (1967). Because of that, "The scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." *Terry v. Ohio, supra* at 19.

By proscribing unreasonable searches, the Fourth Amendment does not bar the warrantless search. Historically, the warrantless search has been considered particularly appropriate in situations involving mobile objects. The distinction between stationary structures and those objects capable of being moved was recognized by the First Congress in the 1789 Act of Congress. That Act required a warrant for the search of a building but

permitted a warrantless search of a ship or vessel which federal agents had "reasonable cause" to believe contained merchandise subject to duty.

This distinction based on mobility has been logically extended to situations involving automobiles. Thus, in striking a balance between the right of society to cleanse itself of its criminal elements, and the prophylactic judicial device utilized to deter official insolence, it has often been noted that judicial review of automobile searches is governed by more flexible principles than those normally applied to searches of the home or other fixed establishments. In *State v. Boykins*, 50 *N.J.* 73,232 A.2d. 141 (1967), for example, the court stated:

> **"Here we are not dealing with the privacy of a home, or of a place of business. We are not dealing with something which is immobile and is thereby limited in its usefulness to the criminal element. Rather the subject is a motor vehicle, which, for all its blessings, is high among the agencies of crime. The automobile is perfectly suited for that use. It provides cover for weapons, contraband, and the fruits of crime. It supplies a capacity to strike without warning and to leave without trace. No discussion of crime can ignore the automobile, or the fact that the incidence of crime is hinged directly to the amount of privacy we accord it." 50 *N.J. supra* at 81-82.**

This view was adopted by this Court in *Chambers v Maroney*, 399 *U.S.* 42 (1970). Also see *Cooper v. California*, 386 *U.S.* 58 (1967); *Carroll v. United States*, 267 *U.S.* 132 (1925).

Our courts have consistently sustained limited searches of automobiles based upon the failure of their occupant to produce proof of ownership or valid operator's license. In *State v. Boykins, supra*, for example, it was held that "A traffic violation as such will justify a search for things related to it. So, for example, if the operator is unable to produce proof of registration, the officer may search the car for evidence of ownership . . ." See also *State v Hock*, 54 *N.J.* 526, 257 A.2d. 699 (1969), *cert.* denied 399 *U.S.* 930 (1970); *State v. Campbell*, 53 *N.J.* 230, 250 *A.2d.* 1 (1969). It is the position of the Respondent

that the search in the instant case was limited in scope and was based upon petitioner's failure to produce a registration certificate or a valid driver's license. There thus existed probable cause to search the automobile for evidence of ownership. It is therefore submitted that the instant search falls within the purview of permissible searches and seizures heretofore sanctioned by this Court.

A multitude of factors existed in the instant case which justified the officer's reasonable suspicion that the automobile was stolen:

(a) the fact that the petitioner was driving a dirty automobile with clean license plates;

(b) the petitioner's failure to produce an adequate driver's license or registration;

(c) the two slips of paper he produced in place of the license or registration, and, more particularly, the fact that the automobile was from Pennsylvania and these papers were from New Jersey;

(d) the petitioner's inability to produce any other identification;

(e) the discovery in the glove compartment of an expired Pennsylvania permit and a registration which represented a similar vehicle with different license plates;

(f) the fact that the keys to the car were not General Motors' originals but rather duplicate keys.

It is not disputed that the search of the glove compartment was valid as an attempt to ascertain the ownership of the vehicle. Failing in this endeavor, and without additional police assistance, Officer Adcock asked the petitioner to describe the contents of the trunk. In doing so, he was merely utilizing another device to determine ownership, under reasonably safe circumstances and affording only a minimal intrusion into petitioner's privacy. The test was designed to provide the officer with information con-

cerning the status of the vehicle. In the instant case, the description given by petitioner was general in nature, and the contents of the trunk minimal. Thus, under these particular circumstances, although petitioner "passed" the initial test, the information received was insufficient to substantially dispel the officer's suspicions. Taking the test one step further, petitioner was asked the contents of the boxes. The examination of the contents of one of the boxes was, therefore, necessary to measure the truthfulness of the petitioner's response and possibly further dissipate the officers reasonable belief that the vehicle was stolen.

The courts of other states have consistently upheld searches based upon the failure of drivers to produce valid licenses or proof of ownership. See *State v. Rys*, 183 *N.E.* 2*d.* 253 (Neb. 1971); *People v. Goodrick*, 11 *Cal. App.* 3*d.* 216, 89 *Cal. Rptr.* 866 (Cal. 1970); *Wiseman v. State*, 474 *P.* 2d. 671 (Okla. 1970); *People v. Smith*, 62 *Misc.* 2d. 473, 308 *N.Y.S.* 2d. 909 (N.Y. 1970; *People v. Dumas*, 25 *Mich.App.* 575, 181 *N.E.* 2*d.* 621 (Mich. 1970); *Orricer v. State* 181 *N.W.* 2*d.* 461 (S.D. 1970); *Shelton v. State*, 3 *Md.* 394, 239 *A.*2*d.* 610 (Md. 1968); *People v. Prochnau*, 251 *Cal.App.*2*d.* 22, 59 *Cal.Rptr.* 265 (Cal. 1967); *People v. Thomas*, 31 *Ill.*2*d.* 212, 201 *N.E.*2*d.* 413 (1964), *cert.* denied 380 *U.S.* 936 (1965); *People v. Bannan*, 372 *Mich.* 292, 125 *N.W.*2d. 875 (1964); *cert.* denied 379 *U.S.* 645 (1964); see also Annotation, 10 *A.L.R.*3*d.* 314.

Federal courts have also consistently upheld such searches. In *United States v. Jackson*, 429 *F.*2*d.* 1368 (7th Cir. 1970), the Court of Appeals upheld a warrantless search of an automobile which had initially been detained for failure to display a license plate. Defendant was unable to produce any document identifying the owner of the vehicle. The police officer also ascertained that the license number of the defendant's automobile was fictitious. A search of the vehicle uncovered marijuana and counterfeit airline tickets. Supreme Court Justice Clark, retired and sitting by special designation, rendered the majority opinion for the Court. In sustaining the search, Justice Clark stated:

> "In our view the recent case of *Chambers v. Maroney*, 399 *U.S.* 42, 90 *S.Ct.* 1975, 26 *L.Ed.*2*d.* 419 decided by the Supreme Court on June 22, 1970 is dispositive of appellant's point. There Mr. Justice White found that

> the rule of permissibility extended to a 'warrantless search, based on probable cause, of an automobile which, having been stopped originally on a highway, is parked outside the Court House.' This is far cry from this case where the officers while still on the scene of the arrest were informed by police radio that the single license plate on appellant's car was in fact registered to another car and owner. This notice itself required a search of the car to find the ownership papers at the least." *Id.* at 1371.

In *Welch v. United States*, 361 *F.2d.* 214 (10th Cir. 1966), *cert.* denied 385 *U.S.* 876 (1968), defendant's vehicle was stopped by a highway patrolman who requested his driver's license and certificate of title. Defendant could produce neither document. The Court held that the officer then had sufficient probable cause for an arrest and for a subsequent search of the contents of the automobile. In upholding the search, the court stated:

> "We agree with the reasoning of the trial court and the application of the most recent search and seizure cases to these facts. The arresting officer had reasonable grounds for stopping the car and inquiring of Manning concerning his driver's license and certificate of title. When he said he had none, the officer undoubtedly had probable cause for arresting him for driving without a license in violation of State law. As the trial court observed, the cursory search before formal arrest may be subject to some criticism, but it is plain that the formal arrest was not based upon what the cursory search revealed, but upon the driver's statement that he had neither driver's license nor certificate of title to the car he was driving. Having made a lawful arrest, the subsequent search of the contents of the car at the time and place of arrest was appropriately incidental thereto." *Id.* at 215.

In *United States v. Owens*, 346 *F.2d.* 329 (7th Cir. 1965), *cert.* denied 382 *U.S.* 878 (1968), a police officer stopped defandant's car for speeding on the Pennsylvania Turnpike. Upon

questioning, the officer determined that the vehicle was registered in another individual's name. The officers suspected that the car was stolen and questioned one of the defendants about the contents of the vehicle's trunk. Defendant thereafter opened the trunk revealing three suitcases. The officer opened one of these suitcases and found a hypodermic needle as well as other narcotics paraphernalia. The Court of Appeals sustained the search, holding that the arrest for speeding was not a mere excuse for an exploratory investigation. In this regard, see also *Unitd States v. Reid*, 415 *F.2d.* 294, (10th Cir. 1969) *cert.* denied 397 *U.S.* 1022 (1970). After observing that the license plate on the vehicle has expired, police officers found defendant sleeping in the vehicle. As a result of the motor vehicle violation, the glove compartment was searched revealing evidence of a crime.

In *Sumrall v. United States*, 382 *F.2d.* 351 (10th Cir. 1967). *cert.* denied 389 *U.S.* 1055 (1968), police officers had probable cause to arrest defendant without warrant for either speeding or driving without a proper license. Having made such lawful arrest, the subsequent search of defendant at the time and place of arrest was found to be appropriately incidental thereto. In *Draper v. Maryland*, 265 *F.Supp.* 718 (D.Md. 1967), while on routine patrol, a Maryland State Trooper stopped the vehicle for a routine investigation and license check. Defendant had no license and the registration was in another person's name. The subsequent search of the vehicle was upheld on this basis.

The foregoing State and Federal holding patently demonstrate that the test utilized by Officer Adcock in searching the trunk and one of the boxes therein was valid in view of petitioner's inability to produce a valid registration or driver's license. The arresting officer clearly possessed reasonable grounds to suspect that the vehicle was being driven without the consent of the owner, and thus was juustified in searching for evidence of ownership. Officer Adcock's conduct, when considered in light of the totality of the circumstances, was clearly reasonable under Fourth Amendment Standards.

B. The Search of the Trunk and the Box Therein Was Valid as a Limited Search under the Circumstances Encountered by Officer Adcock.

This Court has recognized that the concept of probable cause is not the sole criterion by which to judge a search. Thus, in *Terry v. Ohio, supra*, the Court sustained a limited search in a situation where probable cause did not exist. In its opinion, the Court cautioned that the legality of a search could not be predicated on "inarticulate hunches" or on the subjective "good faith" of the officer. *Id.* at 22. Instead, an objective standard was developed:

> "Would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" *Ibid.*

Later in *Davis v. Mississippi*, 394 *U.S.* 721 (1969), the Court hinted that a limited detention under proper circumstances for the purpose of obtaining fingerprint records might "be found to comply with the Fourth Amendment even though there is no probable cause in the traditional sense." *Id.* at 727. Thus the "limited search" was recognized to have vitality in an area other than that of the protective search.

Although factually inapposite, the objective test announced in *Terry* appears to be particularly adaptable to investigative techniques which involve a minimal intrusion upon the individual and impart a great benefit to society and law enforcement authorities in the detection of crime. See *Davis v. Mississippi, supra.* The Respondent respectfully suggests that the *Terry* test would be appropriately applied to determine the reasonableness of the search in the case now before the Court.

Although this Court has not yet extended the application of the limited search concept to situations other than those related in *Terry* and *Davis*, lower courts have taken that initiative. For example, in *State v. Braxton*, 57 *N.J.* 286, 271 A.2d. 713 (1970), the New Jersey Supreme Court held that a police officer has the right to check the serial number on the doorpost of a motor vehicle in order to verify ownership. In opening the door for that purpose, the officer was stationed in a position where he had a right to be, and his observation of the barrel of a gun justified his seizure and examination of that object.

Similarly, in United States v. Powers, 439 *F.2d.* 373 (4th Cir.), *cert.* denied 402 *U.S.* 1011 (1971), the court concluded that the identification number of an automobile is within the protection of the Fourth Amendment, particularly where the vehicle's identification number is not in plain view but in a remote and barely accessible area under the car. However, considering the mobility of a motor vehicle, and the expectation of privacy associated therewith, coupled with a legitimate reason for checking the serial number, the court concluded that the action taken by the police officer was appropriate under the circumstances. Accord *Swiatek v. United States*, 450 *F.2d.* 985 (7th Cir. 1971), *cert.* denied 405 *U.S.* 928 (1972).

The objective standard of *Terry* has been further extended in *White v. United States*, 448 *F.2d.* 250 (8th Cir. 1971), *cert.* denied 405 *U.S.* 926 (1972).

There, the police received information that a man, using an assumed name and driving a rented car, possessed counterfeit money. However, the informant further related that his information was not based on his personal knowledge but on hearsay from an unnamed third person. The police determined that a man under the name related to them had rented a car matching the description given. That car was later discovered parked with with its occupant slumped over the steering wheel. The police ordered the occupant out. As defendant was leaving the vehicle, one officer reached into the back seat and pulled out a small plastic bag. The officer opened the bag and uncovered a syringe. At that time defendant was asked to produce his license which had been visibly altered. He was arrested for that offense. However, based on the discovery of the syringe, a warrant was obtained to search the vehicle for narcotics. Although no narcotics were found, counterfeit twenty dollar bills were uncovered. The court considered that the officer's initial approach to the vehicle was similar to an investigative stop. Although the police officers did not have probable cause to arrest or to search, they had reason to pursue their investigation further. Moreover, they had information that the individual involved was from out of town and might soon disappear. The court analyzed the situation in light of the standard announced in *Terry:*

> "We must now analyze whether at the time of the stop 'the facts available to the officer at the moment of

> **the seizure . . . 'warrant a man of reasonable caution in the belief' that the action taken was appropriate' . . . Admittedly at this point there was not probable cause to arrest the man, because the independently verified pieces of information were not of themselves incriminating. However, we think a stop at this point was clearly justified to obtain identification of the suspect. If he was able to present proper identification, the police would then know that either they had the wrong man or that the tip was unreliable in one essential aspect, namely that the man was using a false name. On the other hand, if he did not have proper identification, the tip would then be corroborated in another essential aspect." *Id.* at 252.**

Thus, the court concluded that "the action taken was appropriate. See also *Hollman v. People,* 46 *Ill.2d.* 311, 263 *N.E.2d.* 7 (Sup. Ct. 1970), in which the court upheld the opening of an envelope discovered in the course of a stop and frisk investigation; *Mendoza v. United States,* 365 *F.2d.* 268 (5 Cir. 1966), in which the court upheld a police officer's examination of the arms of the operator of a motor of a motor vehicle during the course of a routine traffic arrest. *Cf. United States v. D'Avanzo,* 443 *F.2d.* 1224 (2d Cir. 1971) *Cert* denied 404 *U.S.* 850 (1972), in which the court gave great weight to the minimal character of the intrusion involved in an examination of the contents of a dump truck not visible without actually climbing onto the truck. See also *Lindsey v. United States,* 451 *F.2d.* 701 (3rd Cir. 1971), *cert* denied 405 *U.S.* 995 (1972), which relaxed the rules governing stop and frisk "searches" by airport security personnel.

When Officer Adcock questioned petitioner with respect to the contents of the boxes, he answered "It could be anything." Later he indicated that the boxes contained small bags used to package garlic seeds. The suspicious nature of these responses, when reinforced by the unusual circumstances already confronting the officer, alerted him to the possibility of wrongdoing, not only with respect to the status of the vehicle, but also with respect to other criminal activity.

An officer's decision regarding a search and seizure must be drawn by an act of judgment formed in the light of the particular situation and with account taken of all the circumstances."

Brinegar v. United States, 338 *U.S.* 160, 176 (1949). Police officers are trained in the prevention and detection of crime, and thus events which might normally go unnoticed often indicate to the trained eye that something is amiss. The police would be derelict in their duties if they did not investigate such events. *State v. Gray*, 59 *N.J.* 563,285 A.2d.1 (1971). Confronted with a multitude of suspicious circumstances, Offficer Adcock had the right to make a limited search of the trunk and its contents.

Petitioner additionally contends that the search cannot be justified since exigent circumstances were not present. On the contrary, the mobility of the automobile with its attendant capacity for evasion compelled the officer to investigate immediately. *Chambers v. Maroney, supra.*

Since the search of the trunk and the box therein was valid, the discovery of the heroin cannot be considered a fruit, and was therefore properly admitted.

C. Assuming, *Arguendo*, the Illegality of the Trunk Search, the Discovery of the Heroin Was Not a Fruit of the Illegal Search.

Petitioner contends that the discovery of the heroin under the dashboard was a fruit of the illegal search of the trunk, necessitating the exclusion of the heroin from evidence. He argues that Officer Adcock had been "illegally sensitized" to the possibility of drug traffic as a result of the trunk search, and that his "nearly super-human perception" of the bag's contents would not have been made absent such search. The Respondent respectfully submits that even assuming, *arguendo*, the illegality of the trunk search, the discovery of the heroin was clearly independent of the search and was properly admitted.

It is true that evidence obtained through an illegal search or seizure cannot be used in a criminal prosecution. *Mapp v. Ohio, supra.* Thus, the taint of the original, unconstitutional search is to be viewed as encompassing not only the illegally seized evidence, but also evidence subsequently discovered through information acquired in the search. *Silverthorne Lumber Co. v. United States*, 251 *U.S.* 385 (1920).

However, even though the discovery of evidence can be traced back to a constitutional violation, that evidence may still be admissable. Evidence will not be treated as the fruit of the

poisonous tree simply because it would never have been acquired "but for" the illegal activity. The controlling question in each case is:

> "Whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun v. United States*, 371 *U.S.* 471 (1971).

For if those means are substantially removed and distinguishable from the illegality, nothing requires application of the exclusionary rule. *Harrison v. United States*, 392 *U.S.* 219 (1968).

As noted above, once petitioner failed to produce his license and registration, the officer was completely justified in searching for evidence of ownership. Having obtained police assistance, Officer Adcock took the most expedient step by checking the serial number in order to determine the car's status. Clearly, the discovery of the glassine bags in the trunk did not lead to the search for the serial number of the vehicle, because the officer would have searched for the number in any event. Furthermore, the testimony reveals that the heroin was in plain view of the officer when he was conducting his search, and the trial court was at liberty to credit the officer's testimony in this regard. It would be only natural for a law enforcement official to become suspicious of criminal activity upon seeing a bag hanging from beneath a dashboard, especially in light of the surrounding circumstances, and become sensitized to possible drug traffic.

It cannot be doubted that the search for the serial number was valid. In *United States v. Hull*, 437 *F.2d.* 1 (5th Cir. 1971), an illegal search preceded the obtaining of the vehicle's serial number, and the defense urged suppression of all evidence. The court held that:

> "The vehicle identification came from an independent, lawful source wholly apart from the unlawful search and, therefore, such information together with other facts obtained by its use were properly admitted by the district court." *Id.* at 4.

In *Cotton v. United States*, 371 *F.2d.* 385 (9th Cir. 1967), a police officer investigating a suspicious occurrence detained and questioned an individual relative to his car for purposes of identification. The officer subsequently checked the car's serial number, and it was determined that the defendant was masquerading as the owner. The court held that it would limit the right to check the serial number to those cases where there is a legitimate reasn to do so. Under these circumstances, merely to check the serial number in order to more positively identify the car is reasonable and does not constitute a search. *Id.* at 393. The court further observed:

> "(W)e are of the opinion that, when a policeman . . . has reasonable cause to belive that a car has been stolen, or has any other legitimate reason to identify a car, he may open a door to check the serial number" . . . *Cotton v. United States, supra,* at 394; accord, *United Staes v. Johnson, supra,* at 441.

See also, *United States v. Williams*, 436 *F. 2d. 116 (9th Cir. 1970).*

Even assuming, *arguendo,* the illegality of the trunk search, it is respectfully submitted that the discovery of the heroin was not a fruit of that search. As will be shown in Point II, *infra,* it was discovered in plain view during a valid search for the vehicle's serial number and was accordingly properly introduced into evidence.

D. The Detention of Petitioner by the Police Officer was Valid.

As indicated above, Officer Adcock was clearly justified in stopping petitioner for speeding. Furthermore, the failure of petitioner to produce a valid driver's license or registration supplied the officer with probable cause to search the vehicle for evidence of ownership. However, the petitioner argued that after searching the glove compartment of the car, Officer Adcock should have immediately checked the serial number of the car with that found on the registration card in the glove compartment, in order to establish ownership with a minimal amount of interference with petitioner's personal security and privacy. Since he did not do this until (1) the trunk had been opened; (2)

the contents of a box examined; (3) petitioner had been patted down; (4) petitioner was ordered to roll up his sleeves; and (5) police assistance was summoned, petitioner contends that his detention was prolonged and unreasonable. Such a contention lacks substance.

Initially, it is to be noted that Officer Adcock had the right to "pat down" the petitioner to remove any weapons which the latter might seek to use in order to resist arrest or effect his escape, such action being valid either as incident to an arrest, *Chimel v. California*, 395 *U.S.* 752 (1969), or necessary for the protection and safety of the officer under the particular circumstances of the case. *Adams v. Williams*, 407 *U.S.* 143 (1972); *Terry v. Ohio, supra.*

Petitioner's testimony with respect to being ordered to roll up his sleeves was contradicted by Officer Adcock's testimony, and was not a part of the trial court's factual determinations. It can, therefore, be dismissed.

Finally, as shown above, the search of the trunk and boxes therein was valid, and did not violate petitoner's Fourth Amendment rights. Officer Adcock's course of conduct was dictated, to a large extent, by concern for his personal safety. He engaged in those actions which could be conducted without police assistance, and resulting in minimal intrusions into petitioner's privacy in an attempt to determine ownership of the car. It was only after such attempts failed to dispel the officer's doubts as to ownership that he summoned police assistance, in order to safely check the serial number located at the bottom of the door jamb.

Petitioner's argument that an immediate check of the serial number was mandated falls of its own weight. A correlation of the expired registration card with the serial number would have added little toward determining ownership of the car, since petitioner was without identification. Therefore it was not, in any event, the most expedient step to take. Furthermore, police officers are not bound by a rigid course of conduct which must be adhered to in such a situation, but instead must and should act according to the particular circumstances encountered in each case. It cannot seriously be advanced that the detention of petitioner in the instant case, encompassing approximately ten minutes, can be said to be unduly prolonged and violative of Fourth Amendment standards.

The Respondent respectfully submits that the detention of petitioner by Officer Adcock was valid. The discovery of the heroin, therefore, cannot be said to have been a fruit of that detention.

POINT II

THE DISCOVERY OF THE HEROIN IS JUSTIFIED UNDER THE "PLAIN VIEW" DOCTRINE.

Petitioner argues that when Officer Adcock opened the door to obtain the serial number, he was there on a pretext in that he was actually looking for evidence of illegal drug traffic. He, therefore, maintains that the "plain view" doctrine is inapplicable. The Respondent respectfully submits that the discovery of the heroin was valid under the "plain view" doctrine.

In *Harris v. United States*, 390 *U.S.* 234 (1968), petitioner was arrested for robbery when entering his car, and the vehicle was later towed to the precinct as evidence because it had been seen at the robbery site. Pursuant to a police regulation, and without a warrant, the arresting officer searched the car to remove all valuables. While securing the doors and windows, he saw an automobile registration card in the name of the robbery victim on the metal stripping over which the door closed. The Court, in a *per curiam* opinion, held that the card was properly admitted into evidence, stating:

> "Once the door had lawfully been opened, the registration card, with the name of the robbery victim on it, was plainly visible. *It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced into evidence." Id.* at 235. (emphasis added).

As noted above, Officer Adcock had the right to check the vehicle's serial number once petitioner failed to provide a valid license and registration. Because he was without police assistance, he postponed this check until after other steps had been taken to determine ownership. The contention that in making that search, he was on a pretext, is unsupported by the facts of the case.

The Respondent, therefore, respectfully submits that the discovery and seizure of the heroin fell with the "plain view" doctrine, and that it was properly introduced into evidence.

In light of the above, it is the Respondent's view that petitioner has failed to demonstrate sufficient grounds for granting certiorari, since the decision is in accord with applicable decisions of this court as well as other state and federal courts.

CONCLUSION

For all the foregoing reasons, respondent, State of New Jersey, respectfully prays that the writ of certiorari sought in the above named petition pending before this court not issue.

Respectfully submitted,

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